

86-989

No. 86-

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DEC 15 1986

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JOSEPH F. SPANIOLO, JR.

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York and the
NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

- v. -

MICHAEL J. OLIVIERI, et al.,

Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
TWO VOLUMES
VOL. II, PP. 163-234

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December 12, 1986

BPP

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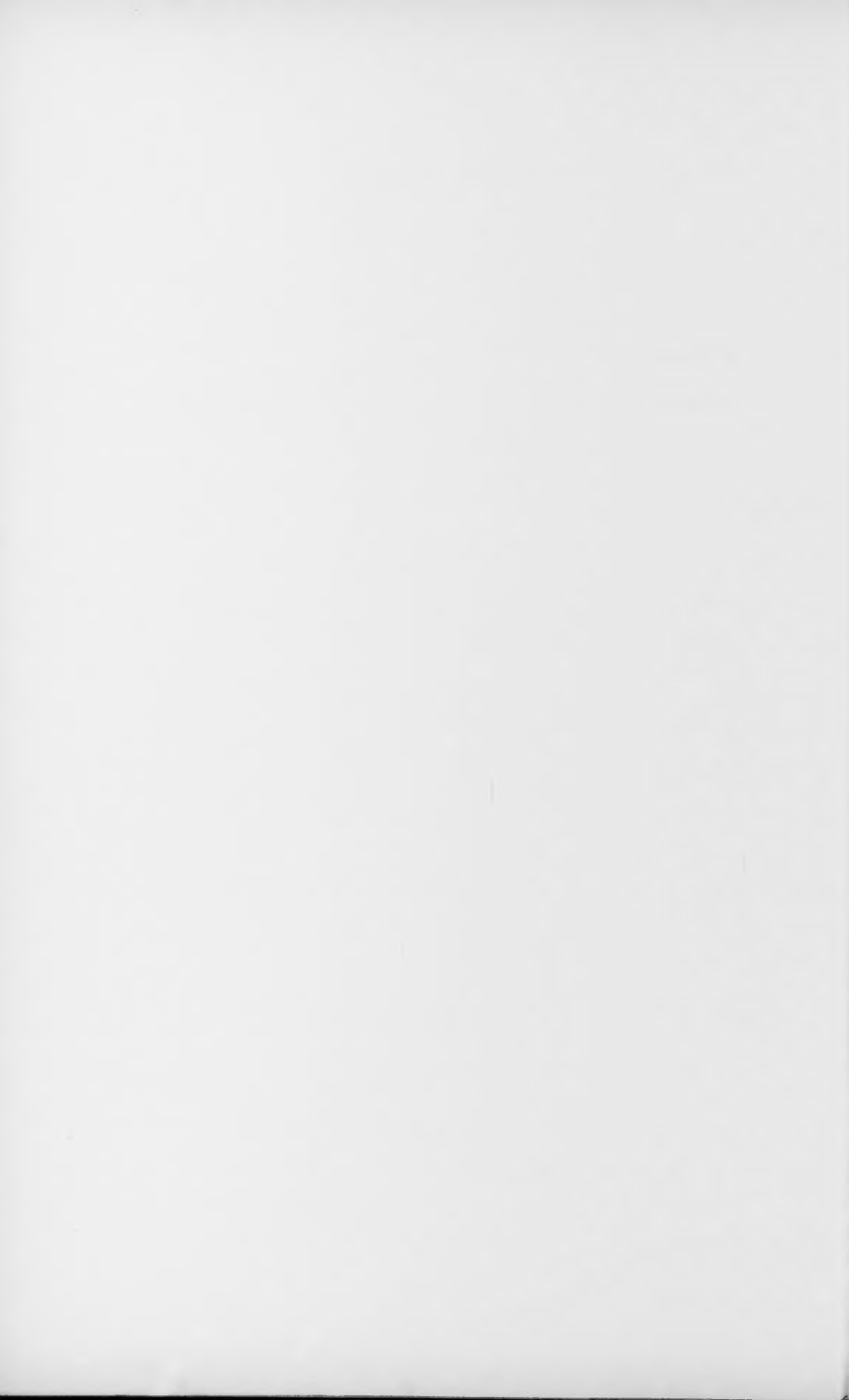
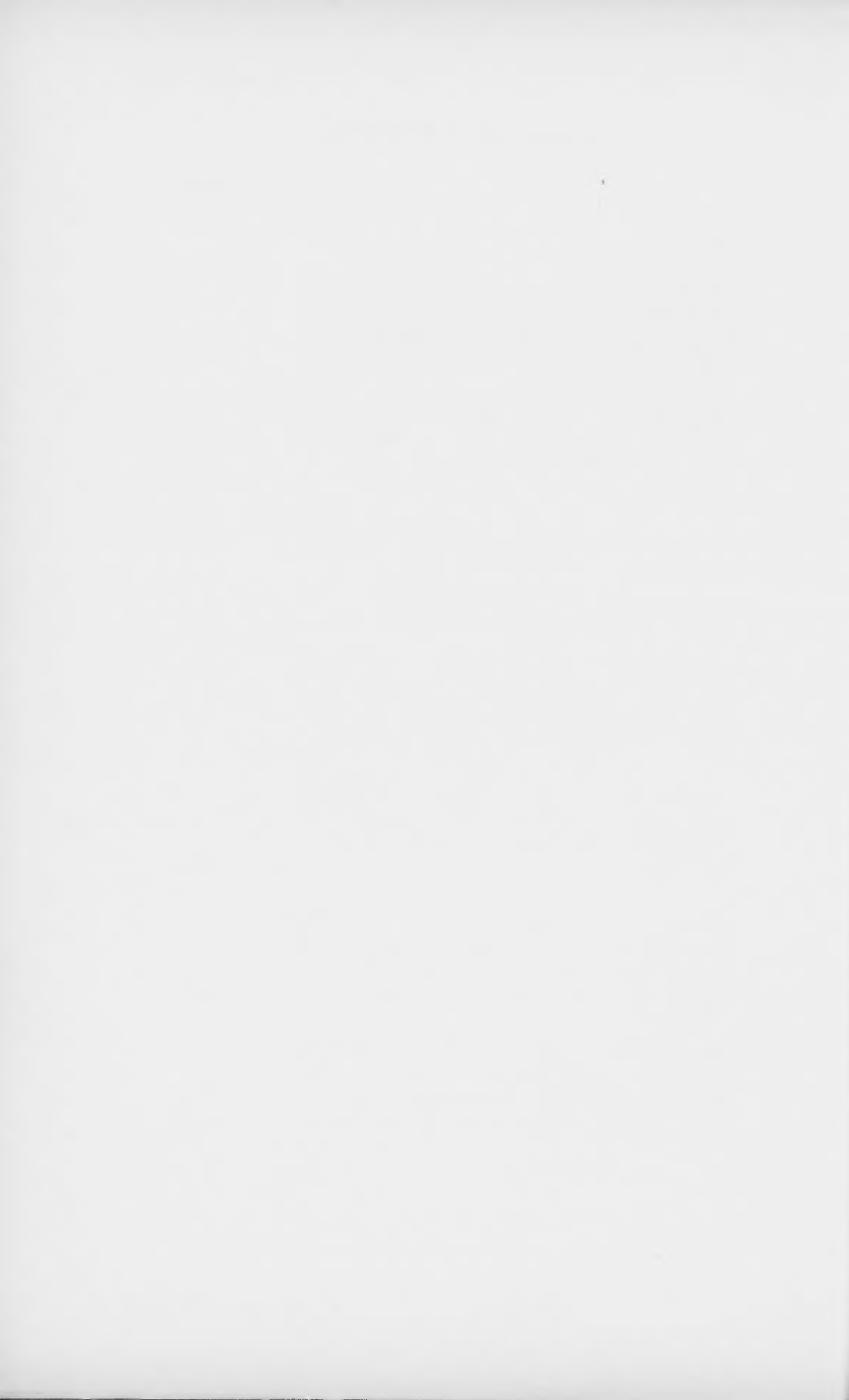


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**DECISION OF THE UNITED STATES COURT
OF THE APPEALS, SECOND CIRCUIT**

MICHAEL J. OLIVIERI, J. MATTHEW
FOREMAN, MICHAEL DILLINGER, TOM
KOHLEK, RICHARD FERRARA, EDMUND W.
TRUST, HUGH R. BRUCE, JOHN D.
EDWARDS, JOSEPH BROWN, JULIUS J.
SPOHN, BERNARD L. TANSEY, CLINT
WINANT, DAVID LAWLOR, JIM CANNON,
JAMES DOYLE, NED LYNAM, EDWARD
BYRNE, MICHAEL CONLEY, EDWARD
HARBUR, ROBERT J. BUEL, CHRISTOPHER
WESOLOWSKI, GARY W. SPOKES, and
DIGNITY-NEW YORK,

Plaintiffs-Appellees,
Cross-Appellants,

v.

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his capacity as the
Mayor of the City of New York and the NEW
YORK CITY POLICE DEPARTMENT,

Defendants-Appellants,
Cross-Appellees.

Nos. 1548, 1552, Dockets
85-7509, 85-7511.

United States Court of Appeals
Second Circuit

Argued June 25, 1985
Decided June 28, 1985.

Stephen J. McGrath, New York City
(Leonard Koerner, David Drueding, Jonathan
L. Pines, Frederick A. O. Schwarz, Jr.,
Corp. Counsel of City of New York, New
York City, of counsel), for
defendants-appellants, cross-appellees.

Stuart W. Gold, New York City (Valerie
Caproni, Anne E. Verdon, New York City,
of counsel), for plaintiffs-appellees,
cross-appellants.

Before KEARSE, CARDAMONE and
FRIEDMAN,* Circuit Judges.

CARDAMONE, Circuit Judge:

Before St. Patrick's Cathedral on New York City's Fifth Avenue, is a 250 foot long public sidewalk whose width from the private steps of the Cathedral to the curb of Fifth Avenue is about 25 feet. Plaintiffs are members of a gay and lesbian Catholic group, Dignity-New York, claiming their right to freedom of speech. They seek to place 100 of their members on this sidewalk before the church to conduct a religious demonstration during the annual Gay Pride

* Honorable Daniel M. Friedman, Circuit Judge for the Federal Circuit, sitting by designation.



March. Defendants are the Police Commissioner and the Mayor of New York City and the City Police Department. Urging that its obligation to protect public order compels it to impose limits on the time, place and manner of plaintiffs' demonstration, the Police Department proposes "freezing" (clearing) the sidewalk during the parade. Instead, it has set aside a demonstration area for plaintiffs on 51st Street, adjacent to the Cathedral, and a similar designated area on 50th Street for anti-gay demonstrators.

Courts have the solemn responsibility when the First Amendment rights of a minority clash with the rights of others to preserve one while maintaining the other, without sacrificing either. Translating cherished freedoms enshrined in our Constitution to the harsh realities of the street is not an easy task. Because the

excuses offered for refusing to permit the fullest scope of free speech often are disguised, a court must carefully sort through the reasons offered to see if they are genuine. In this case, we believe they are. For the last two years a fair format for Dignity's demonstration on this occasion has evolved, which this year plaintiffs seek to expand. In order to maintain plaintiffs' rights while safeguarding the rights of the anticipated 75,000 marchers, those attending Sunday church services at the Cathedral and the public, the same general scenario as that followed in 1983 and 1984 should be adhered to again this year.

I

Plaintiffs Dignity-New York and a number of its members brought this action for declaratory and injunctive relief in the United States District Court for the Southern District of New York. Plaintiffs sought an

order enjoining the Police Department from carrying out its plan to close off the sidewalk in front of St. Patrick's Cathedral during the "Gay Pride March" along Fifth Avenue scheduled for this Sunday June 30, 1985, and thereby denying Dignity the right to demonstrate on the sidewalk during the march. Plaintiffs moved pursuant to Fed. R. Civ. P. 65 for a preliminary injunction.

By order dated June 18, 1985 the district court (Motley, Ch. J.) issued an order enjoining defendants from preventing a "reasonable" number of Dignity members from holding a demonstration on the Cathedral sidewalk, but expressly not prohibiting defendants from exercising their professional judgment to maintain order. The Police Department has appealed this order claiming that its plan constituted a reasonable time, place and manner restriction on plaintiffs' First Amendment rights and that the district



court abused its discretion by improperly substituting its judgment for that of the Police Department in weighing and determining the threat to public order. Plaintiffs also appeal claiming that the district court abused its discretion by issuing an order that was impermissibly vague because it failed to state a specific number of Dignity members that may remain on the Cathedral sidewalk. For reasons that follow, the order should be reversed and the preliminary injunction vacated.

II

As described by plaintiffs, the "Gay Pride March" is "the major public demonstration organized by the local gay and lesbian community every year." The march was first held in New York City in 1970, and over the years the Police Department and the march's organizers have established a



cooperative relationship that has helped to make the annual march a success. Last year approximately 75,000 people participated. While the marchers have generally proceeded without incident, they have not been free of harassment and violence by anti-homosexual demonstrators. During the 1981 march some participants, including members of Dignity, were assaulted on the steps of St. Patrick's Cathedral by self-appointed "protectors" of the Cathedral. As a result, the police detail was increased in 1982, but the sidewalk remained open. During the 1982 march, there were several instances in which provocative words were exchanged between demonstrators and counter-demonstrators, but no violence resulted. From 1976 through 1982 Dignity members stepped out of the line of march and gathered on the steps at the front of the Fifth Avenue entrance of St. Patrick's Cathedral and there participated in



a prayer service that continued through the duration of the march.

During the 1983 and 1984 parades the steps and sidewalk directly in front of St. Patrick's Cathedral were closed. Dignity officers were permitted to stop the line of march to lay a wreath on the sidewalk in front of the Cathedral and to hold a short prayer service in the street for 10-15 minutes. Both in 1983 and 1984 approximately 100 anti-gay demonstrators appeared. This year, as usual the parade will commence at Central Park South and run to the end of Fifth Avenue at Washington Square in Greenwich Village. The Police Department indicated that it would follow the same course for this year's march as it followed in 1983 and 1984, that is, closing the sidewalk but permitting Dignity officers to conduct a short prayer service on the



street in front of the Cathedral and to lay a wreath.

Less than two months ago Dignity instituted this action seeking to extend the demonstration rights granted them in 1983 and 1984. Plaintiffs want to locate 100 of their members on the sidewalk in front of the Cathedral for the duration of the march so that their demonstration may be witnessed by all the marchers. It is estimated that it will take several hours for the entire parade to pass a single spot. The Police Department avers that it does not have at hand sufficient resources to control what -- in New York City Police Commissioner Ward's opinion -- is a reasonable risk of a riot on Fifth Avenue were such a sidewalk demonstration to be permitted during a march of this year's size.

The district court concluded that any fear that the Gay Pride March in general and



the Dignity demonstration in particular will attract more violence this year than in past years were merely "speculative." The hearing record contains strong unrefuted evidence to the contrary. First, several lawsuits have been commenced against the City by groups attempting to enjoin the holding of the parade. Second, Catholic War Veterans and Knights of Columbus members have expressed strong opposition to gays gathering near the Cathedral. They and a group designated as the Committee to Defend the Cathedral are sending literature and mailings in an effort to recruit anti-gay demonstrators. Last year, some members of these groups overran the police barriers and claimed the police had "double-crossed" them by permitting Dignity to hold a service. Third, over the past year the Catholic Archdiocese of New York has taken a strong stand publicly against the economic interests

of gay people by refusing to hire them. Fourth, Dignity members in the past year have demonstrated more than once at the Cathedral. Fifth, this year's parade organizers met with the police in late May 1985 to inform them that according to their own "highly reliable" sources, a large number of Orthodox Jews from Brooklyn planned to block the parade route near 49th Street. The Grand Marshall of last year's parade said that if the police failed to remove the Jewish demonstrators forcibly, the marchers would. The police have considered all this information and as a result of their own investigation credit much of it. The police believe that the parade this year will be more volatile than in the past.

For these reasons, the City Police Department has concluded that prudence dictates that it must take reasonable



precautions to protect the marchers and the public from violence. It is the Department's position that no one should be allowed to demonstrate on the sidewalk in front of the Cathedral. The unrefuted testimony in the record establishes that it is Police Department policy not to permit demonstrations adjacent to the line of march, and not to permit demonstrations by antagonistic groups to be held near each other. Finally, this is not the only occasion when the sidewalk in front of a church has been closed to the general public. During the St. Patrick's Day Parade, and most others, the sidewalk in front of St. Patrick's is "frozen." The same is done, according to police testimony, with the sidewalk in front of Fifth Avenue's Temple Emmanuel.

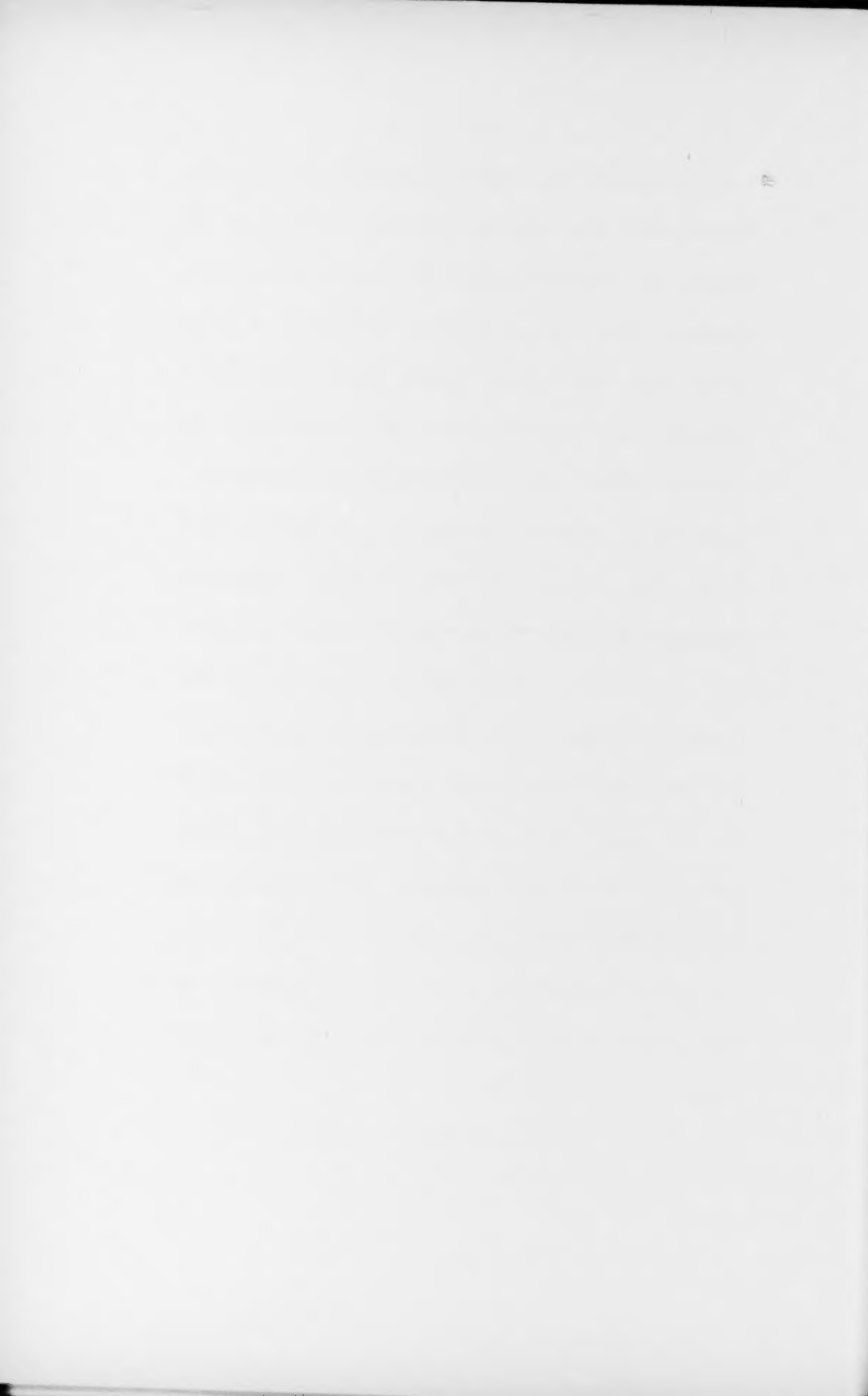


III

Although the right of access to a public forum for the discussion and interplay of ideas is fundamental in our democratic system, that right is not absolute. It is established that "reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests." Concerned Jewish Youth v. McGuire, 621 F.2d 471, 473 (2d Cir. 1980) (quoting Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972)). The Police Department claims that its plan to freeze the sidewalk in front of St. Patrick's Cathedral during the Gay Pride March is such a reasonable time, place and manner limitation.

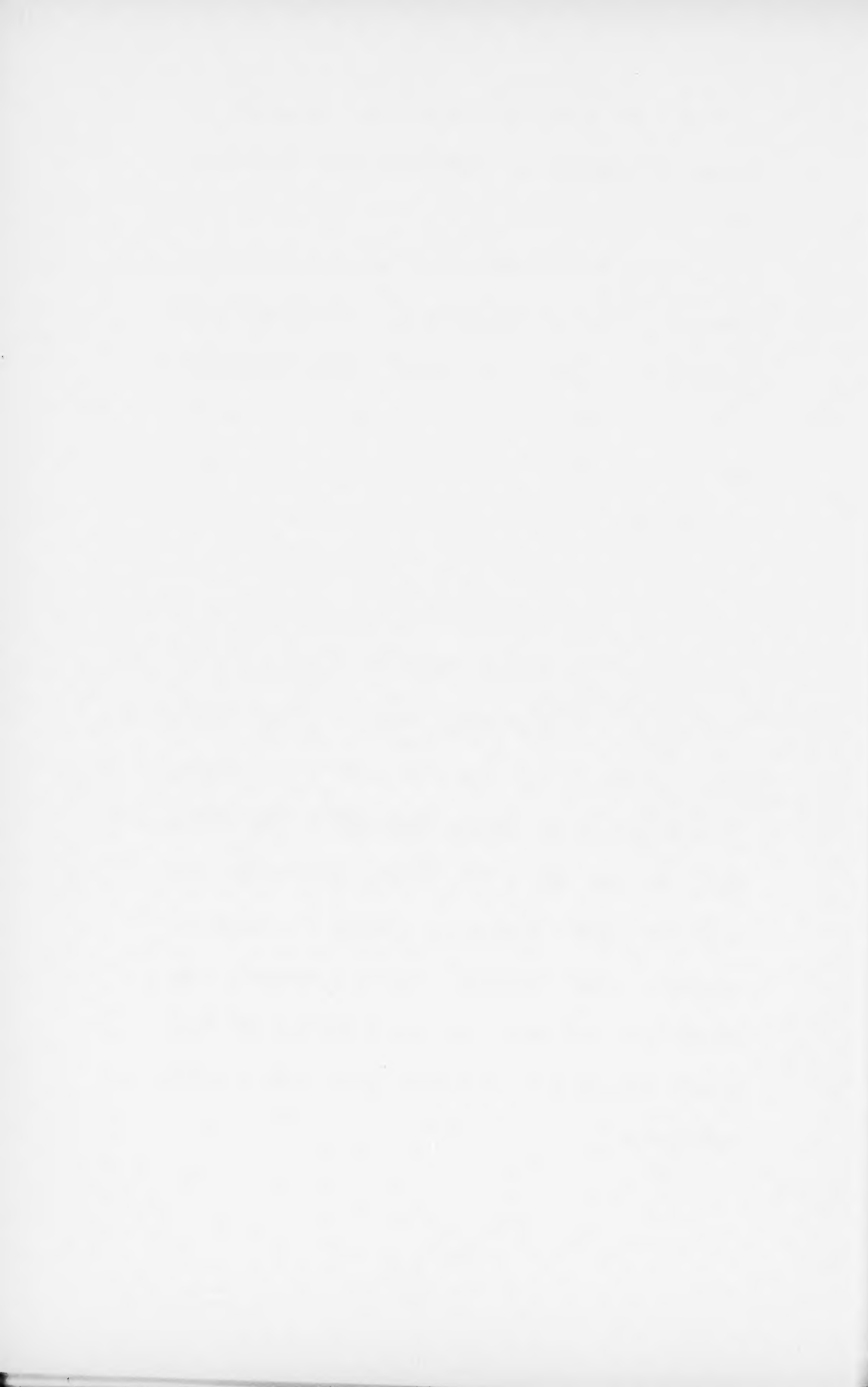
The standard to be employed in evaluating such a restriction, as the court below recognized, is:

1. It must be content-neutral;



2. It must be narrowly tailored to serve a significant governmental interest; and

3. It must leave open ample alternative channels for communication. Clark v. Community for Creative Non-Violence, __U.S.__, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). This Court's standard of review on appeal of a preliminary injunction is "whether issuance of the preliminary injunction, in light of the applicable legal standards, constitute[s] an abuse of discretion." LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 74 (2d Cir. 1985) (citing Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2567-2568, 45 L.Ed.2d 648 (1975)). When evaluating whether the district court abused its discretion, we must let its findings of fact stand unless we find that they are clearly erroneous.



Dignity asserts that the Police Department's proposed freeze of the sidewalk is not content-neutral because it is an ad hoc response to one specific controversy, that is a kind of "heckler's veto." On the contrary, the undisputed testimony on the record plainly shows that this action is completely consistent with an established policy of the Police Department to keep demonstrators away from the line of march of a parade, and to keep demonstrators and counter-demonstrators away from each other. The Department has developed his common sense policy in order to uphold its statutory obligation to "preserve public peace," to disperse "assemblages which obstruct the free passage of public streets, sidewalks, parks, and places," and to "protect the rights of persons and property." New York City Charter § 435. In this case the restriction is being imposed on plaintiffs and



their adversaries, both of whom have expressed to the Department a desire to occupy the same Cathedral sidewalk during the same June 30th March.

Further, the restrictions has been narrowly tailored to further an important government objective. Unquestionably, maintenance of the public order is such an aim. Here, the Police Department fears an outbreak of violence during a march with an estimated 75,000 participants. The district court found no such danger of violence. After an exhaustive review of the hearing record, we can come to no other conclusion than that the district judge's finding on this point is clearly erroneous. The record shows, as noted, that what has always been a confrontation situation promises to become much more volatile this year. Given this fact, the Department has not proposed that the demonstrators be silenced, it seeks only



to keep the demonstrations a reasonable distance from both the marchers and from each other.

Finally, the demonstrators have been afforded ample alternative channels for communication. The Police Department's proposal would allow the Dignity demonstrators to demonstrate in a side street near the Cathedral. It would also permit them, as in the past two years, to stop the parade, conduct a short service in the street in front of the Cathedral, and lay a wreath on the Cathedral sidewalk. Thus the group is not stopped from conveying its message. They are merely not being allowed their preferred forum for demonstration.

Dignity argues that the threat of disruption and possible violence by anti-gay demonstrators does not justify the police ban on use of the sidewalk by Dignity to conduct its demonstration as it is the police's

responsibility to curb hostile demonstrators. We cannot agree. The fundamental responsibility of the police is to preserve public order and protect the marchers; the police legitimately are concerned that they could not perform those functions if Dignity conducted its proposed sidewalk demonstration. This type of determination is uniquely within the Police Department's expertise. It is no answer to say that the police nevertheless should find some way to accomplish those objectives while permitting the very Dignity demonstration that threatens the ability of the police to maintain control of the situation.

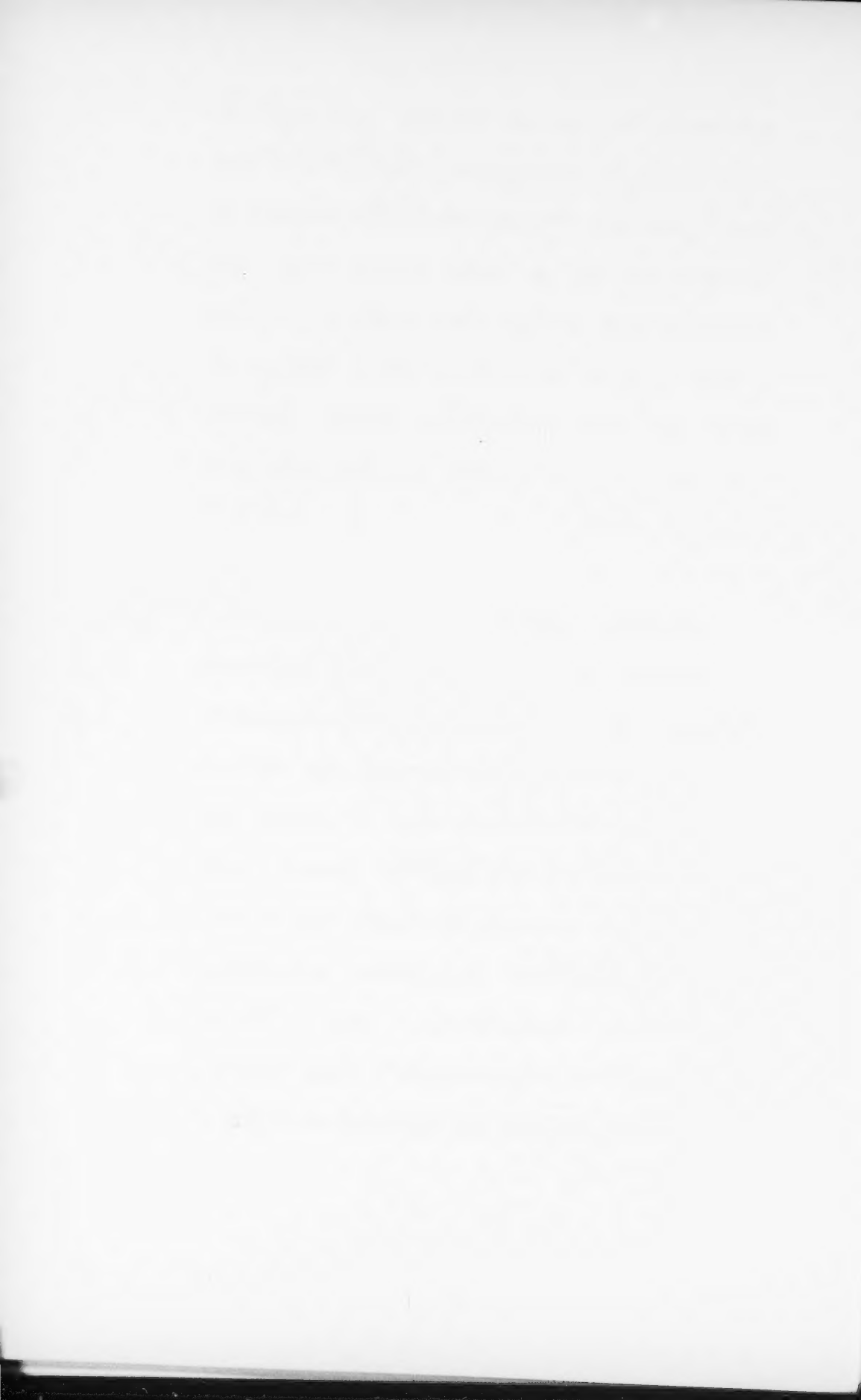
Accordingly, we hold that the district court abused this discretion by issuing the preliminary injunction. The order of the district court is therefore reversed, the injunction vacated, and the matter remanded to the district court with directions to order



defendant to permit Dignity no less an opportunity to demonstrate than in 1983 and 1984. That is, Dignity should be allowed to demonstrate on a side street near the Cathedral and to halt the parade to conduct a short prayer service on Fifth Avenue in front of the Cathedral, which service includes laying a wreath on the Cathedral sidewalk.

KEARSE, Circuit Judge, dissenting:

Though I think this case presents difficult practical and conceptual questions, and although I would modify the district court's injunction for the sake of clarity and enforceability, I respectfully dissent from the majority's decision to vacate the district court's preliminary injunction prohibiting defendants (collectively the "Police Department" or "Department") from barring plaintiffs from using the sidewalk in front of



St. Patrick's Cathedral for a demonstration during the "Gay Pride March" scheduled for June 30, 1985.

The standard in this Circuit for the issuance of a preliminary injunction requires the moving party to establish (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) a sufficiently serious ground for litigation and a balance of hardships tipping decidedly in its favor. E.g., Sperry International Trade, Inc. v. Government of Israel, 670 F.2d 8, 11 (2d Cir. 1982); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). The ultimate question on appellate review of a district court's issuance of a preliminary injunction is whether, in light of the applicable standard, the court has abused its discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2567-2568, 45 L.Ed.2d 648

(1975); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979). Such an abuse of discretion may take the form of an erroneous view of the law, or error in findings of fact, or error in the form of the injunction. E.g., Coca-Cola Co. v. Tropicana Products, Inc., 690 F.2d 312, 315 (2d Cir. 1982).

Since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); see also 414 Theatre Corp. v. Murphy, 499 F.2d 1155, 1160 (2d Cir. 1974), the sole question on this appeal, apart from the form of the injunction, is whether the district court erred in ruling that plaintiffs had shown a likelihood of success on the merits of their claim.



**A. THE MERITS OF THE FIRST
AMENDMENT CLAIM**

The claim of the plaintiffs, who are Catholic homosexuals, is that the sidewalk in front of St. Patrick's Cathedral is a public forum that is uniquely suited to the message they wish to convey, which is that notwithstanding the disapproval of their homosexuality by the Catholic Archdiocese of New York, they wish to remain within the mainstream of Catholicism; that they have a First Amendment right to use that forum to express this message; and that the Department's plan to deny them access to that forum by barring virtually all speech from the sidewalk during the March abridges that right. Since there can be little doubt that the sidewalk in front of St. Patrick's is a "quintessential public forum[]," Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983);

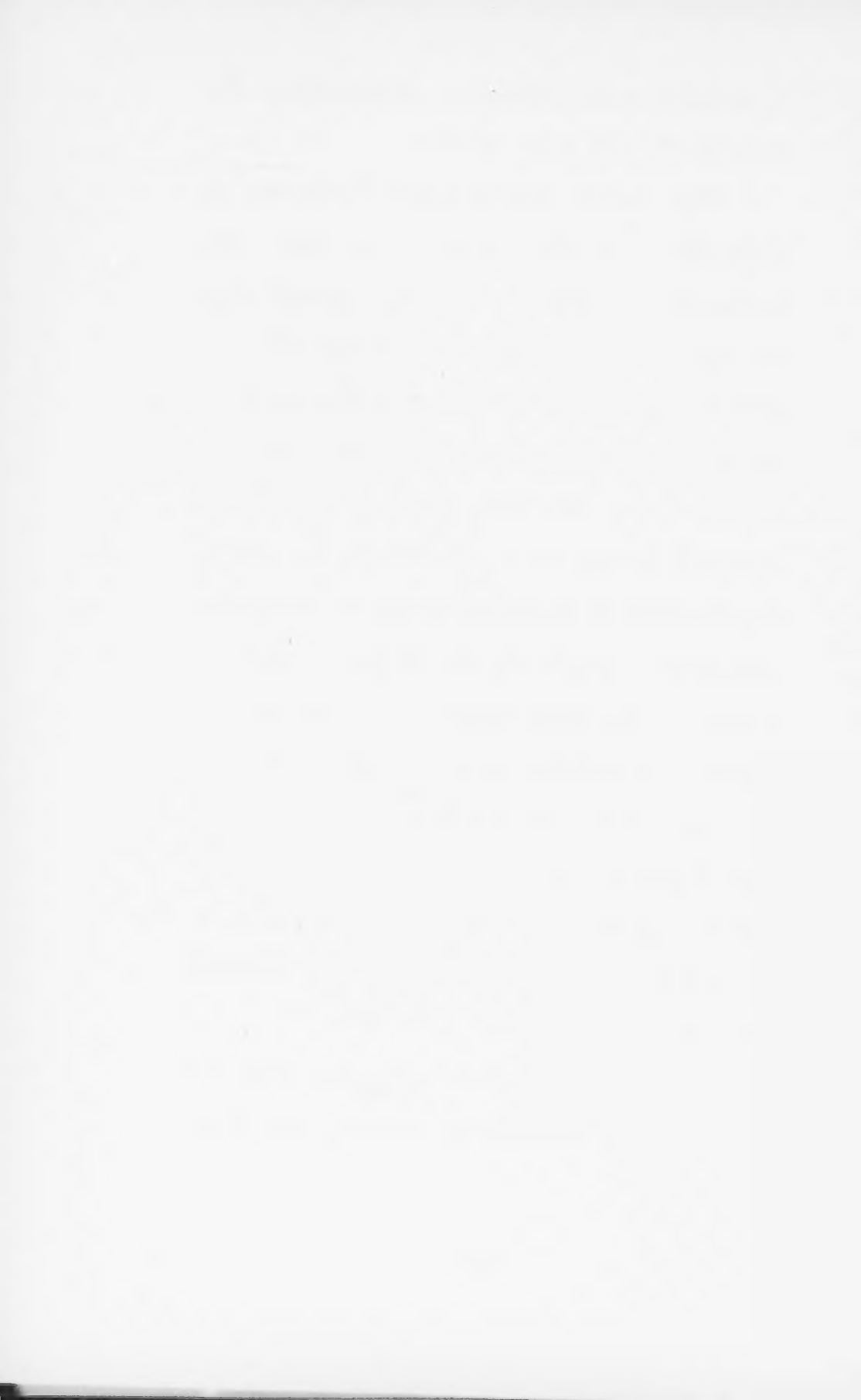
accord United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983); Carey v. Brown, 447 U.S. 455, 460, 100 S.Ct. 2286, 2289, 65 L.Ed.2d 263 (1980); Hudgens v. NLRB, 424 U.S. 507, 515, 96 S.Ct. 1029, 1034, 47 L.Ed.2d 196 (1976), the focus must be on whether the Department's special plan to close that forum to plaintiff's group during the March was a valid "time, place, and manner" regulation, i.e., one that was "justified" without reference to the content of the regulated speech, that . . . [was] narrowly tailored to serve a significant governmental interest, and that . . . le[ft] open ample alternative channels of communication of the information." Clark v. Community for Creative Non-Violence, __U.S.__, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); accord United States v. Grace 461 U.S. at 177, 103 S.Ct. at 1706; Perry Education Association



U.S. at 45, 103 S.Ct. at 954.

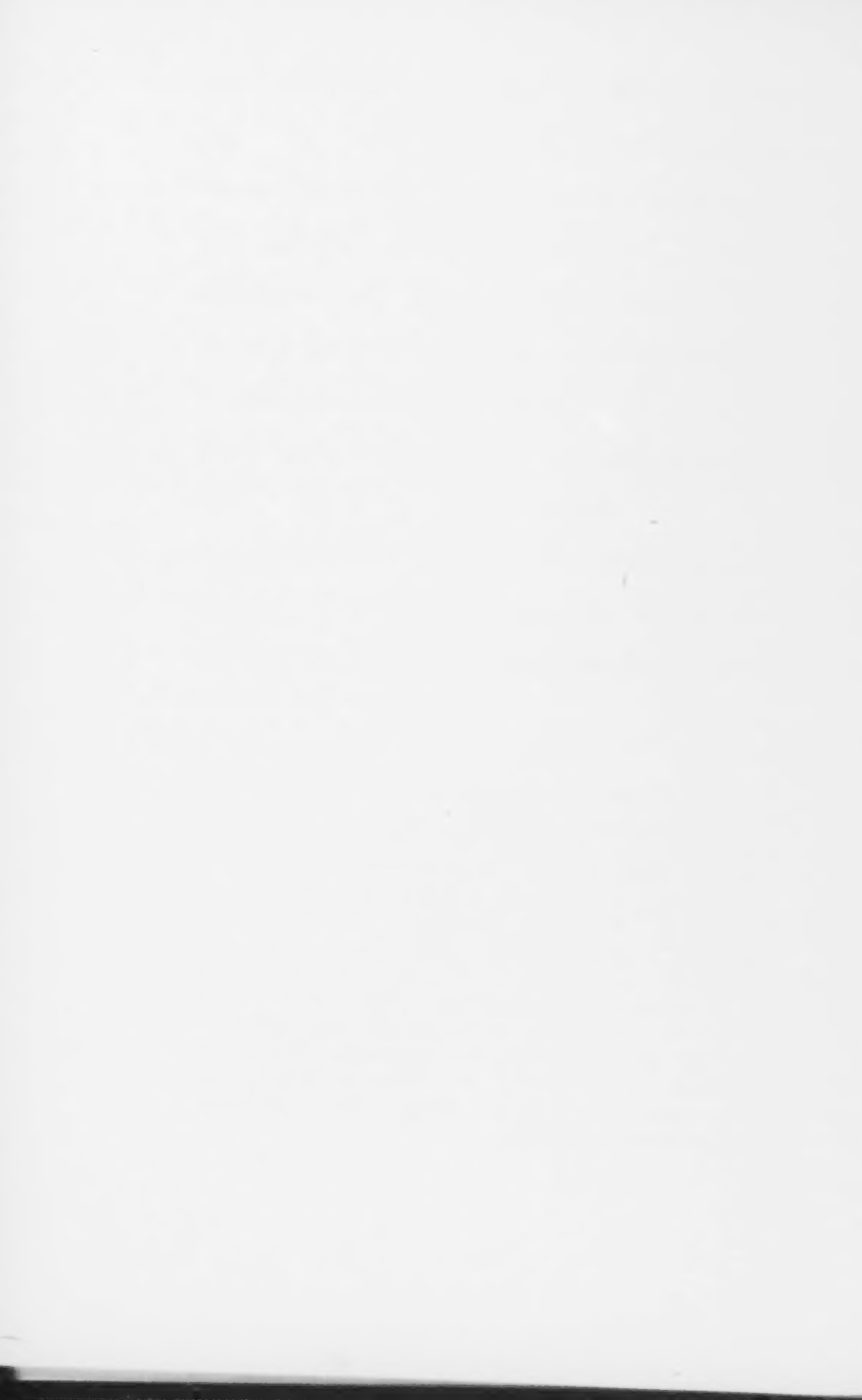
The Police Department's response to plaintiffs' current request to use the Cathedral sidewalk in a parade-long ceremony was, as it was in 1983 and 1984, to prohibit their use of the sidewalk entirely except to permit the parade to pause when it reaches St. Patrick's for a 15-minute ceremony in the street, and to permit one or two members of plaintiffs' group to enter the Cathedral sidewalk to lay there a symbolic wreath. The Department would also permit plaintiffs to conduct a parade-long ceremony on a side street across from the Cathedral. The Department's view is that any greater use by plaintiffs of the sidewalk in front of St. Patrick's would unreasonably increase the risk of violence.

The risk of violence comes not from the plaintiffs, as defendants concede, but from



groups hostile to plaintiffs.¹ However, the implementation of but two of the Department's usual policies should suffice to minimize the risk of violence without any need to bar plaintiffs from the Cathedral sidewalk. First, the Department's general policy is to separate mutually antagonistic demonstrations by the distance of at least one city block and to keep such demonstrations out of sight and hearing of each other. Second, its policy is to prohibit hostile demonstrations from occupying the

¹ This factor distinguishes the present case from Concerned Jewish Youth v. McGuire, 621 F.2d 471, 473 (2d Cir. 1980), where this Court upheld a Department policy of restricting those who sought to demonstrate in front of the Russian Mission to a "bullpen" more than 100 feet from the Mission's entrance. There, it was the demonstrators themselves who posed the threat of violence, which threat was inherent in their proximity to the Mission. Here, by contrast, any threat of violence comes not from plaintiffs but from the anti-gay counterdemonstrators.



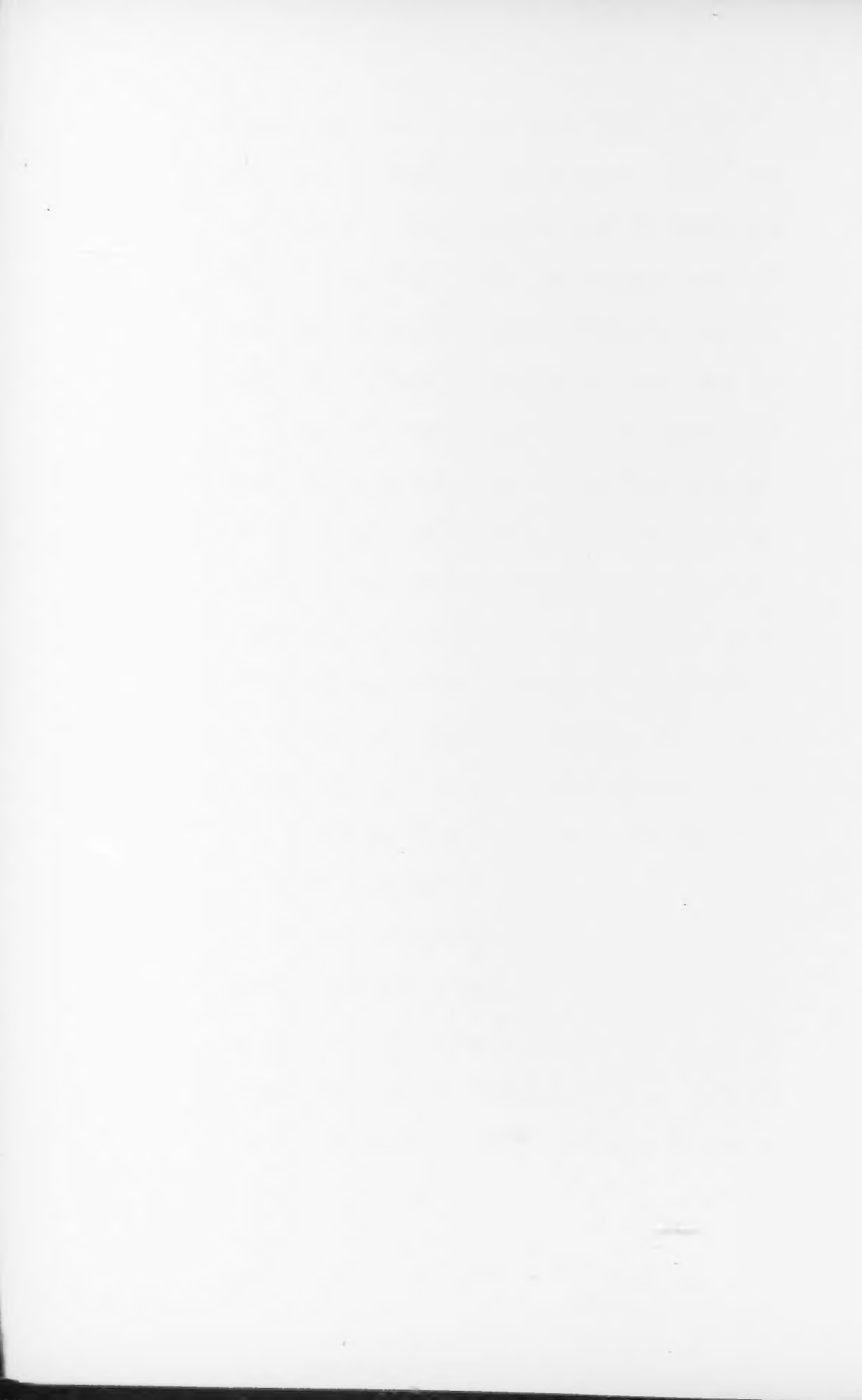
sidewalk directly adjacent to a parade possessing an official permit.² Implementation of these policies would appear to provide the safeguards normally established by the Department even if plaintiffs' group were to occupy the sidewalk in front of St. Patrick's.

² The majority states this second policy as prohibiting all demonstrations from occupying a sidewalk directly adjacent to a parade. I find no support for this in the record. Not only were plaintiffs themselves permitted to conduct such a demonstration on the steps and sidewalk in front of St. Patrick's in conjunction with the March prior to 1983, but Catholic leaders and their invited guests, sometimes numbering several hundred, are consistently permitted to occupy the sidewalk in front of the Cathedral and to greet dignitaries passing in the line of march during, for example, the St. Patrick's Day Parade, the Puerto Rican Day Parade, and the Columbus Day Parade. Further, as discussed infra, the Department has conceded that if there were no threat of hostile counterdemonstrations, plaintiffs' use of the sidewalk in front of the Cathedral would be permitted.



It is clear from the record, and counsel for the Department conceded at oral argument of this appeal, that if it were not for the threats of certain anti-gay Catholic groups, plaintiffs' group would be permitted to use the Cathedral sidewalk. Further, according to a Department official, the Catholic anti-gay groups would be perfectly satisfied with the Department plan to bar everyone from the Cathedral sidewalk since their primary goal is to prevent plaintiffs' group from occupying that location. The latter fact confirms plaintiffs' contention that the Cathedral sidewalk is a forum of especial symbolic significance for their message.

Given these facts, it becomes clear that the only reason the Department seeks to bar plaintiffs' group from the Cathedral sidewalk is because of the threats of the anti-gay groups. This response by the Department, in lieu of reliance on its more usual policy of



providing a one-block buffer zone from whatever the site of plaintiffs' demonstration may be, plainly has given the Catholic anti-gay groups a classic "heckler's veto." Such a veto has consistently been rejected by the courts as a valid basis for restricting the exercise of free speech in a traditional public forum, see, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 615-16, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971); Bachellar v. Maryland, 397 U.S. 564, 567, 90 S.Ct. 1312, 1314, 25 L.Ed.2d 570 (1970); Gregory v. Chicago, 394 U.S. 111, 117, 89 S.Ct. 946, 949, 22 L.Ed.2d 134 (1969); Terminiello v. City of Chicago, 337 U.S. 1, 4-5, 69 S.Ct. 894, 895-896, 22 L.Ed.2d 134 (1949); Wiegand v. Seaver, 504 F.2d 303, 306 (5th Cir. 1974), cert. denied 421 U.S. 924, 95 S.Ct. 1650, 44 L.Ed.2d 83 (1975); Beckerman v. City of Tupelo, 664 F.2d 502, 509-10 (5th Cir. 1981); Collins v. Chicago



Park District, 460 F.2d 746, 754-55 (7th Cir. 1972), and was, in my view, properly rejected by the district court here.

The Department argues that allowing plaintiffs to use the sidewalk while denying such use to the anti-gay counter-demonstrators would impair the content neutrality of its policies. I view this invocation of First Amendment doctrine in order to bar virtually all expression from an area in which at least one group's speech would otherwise be fully permitted under the Department's usual policies as an untoward ironic twist. The essence of the Amendment is to promote speech rather than to inhibit it. The Department's argument suggests that whenever two groups seek to speak in the same public place at the same time, if both cannot be simultaneously accommodated both should be prohibited from speaking. The notion of content-neutrality mandated by



the First Amendment surely does not lead to such a result. Rather, that principle requires that when there are more individuals or groups seeking to use a public forum than can safely be accommodated, the state must select from among them on a basis other than its evaluation of the view that each seeks to express. Here, the Department refused to make any selection at all, whether through the application of its usual policies or otherwise, and by a misguided invocation of content-neutrality, it seeks unnecessarily to restrict the speech of all.

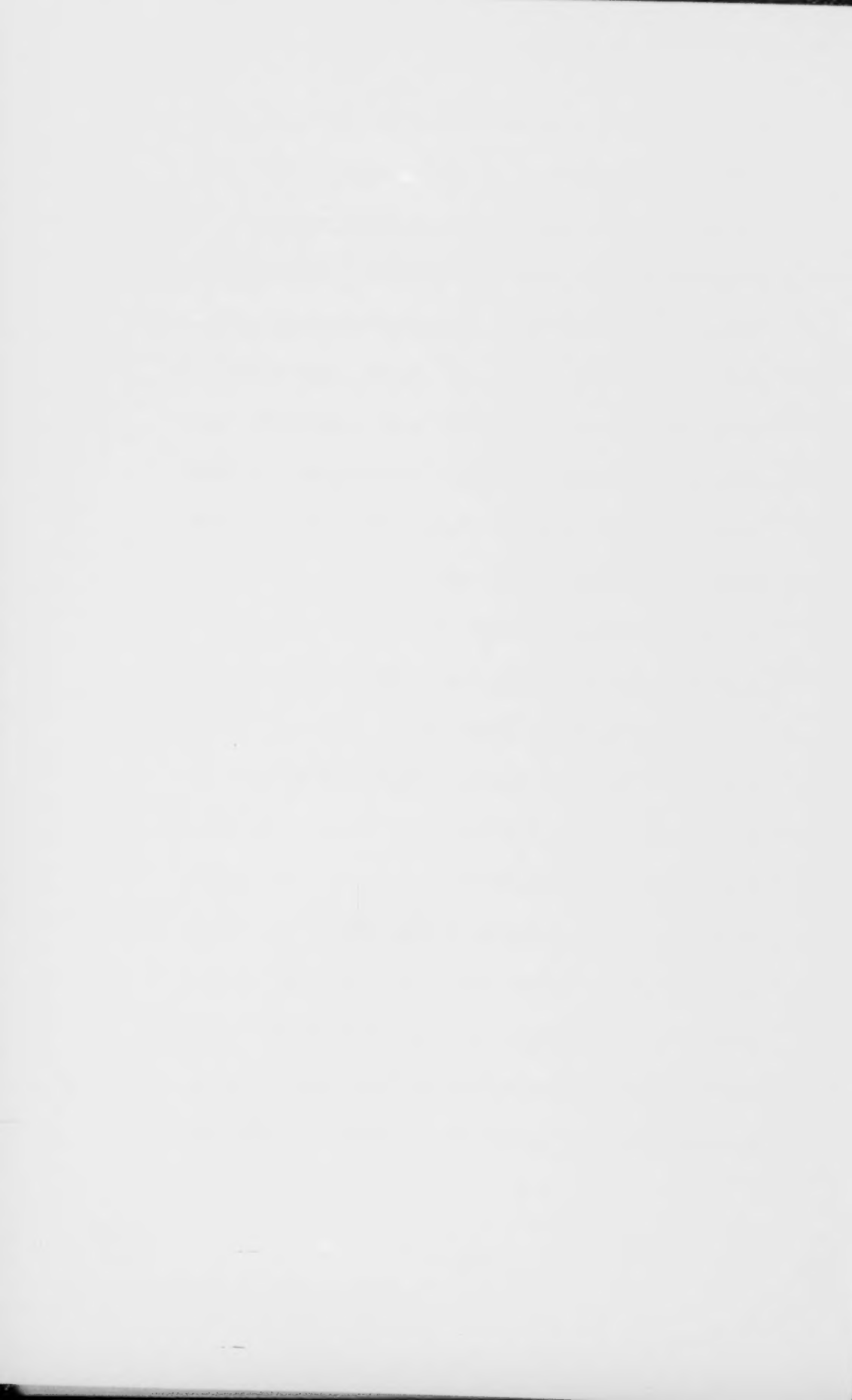
I do not view the Supreme Court's language in Clark v. Community for Creative Non-Violence, 104 S.Ct. at 3072, as requiring substantial deference to the view of the Police Department in this matter. In Clark, the Court intimated that the judiciary should not second-guess the Park Service's



balancing of interests which led to its policy of restricting overnight camping in the parks to designated areas. The regulation there at issue particularized a long-standing policy of the Park Service that was directed primarily at the regulation of camping, not of expression. See 36 C.F.R. §50.27(a) (1984); 24 Fed.Reg. 11,014 (1959). In the present case, the challenged plan was one designed directly to regulate freedom of expression, and I think the district court was required to evaluate that response within the traditional analytical framework.

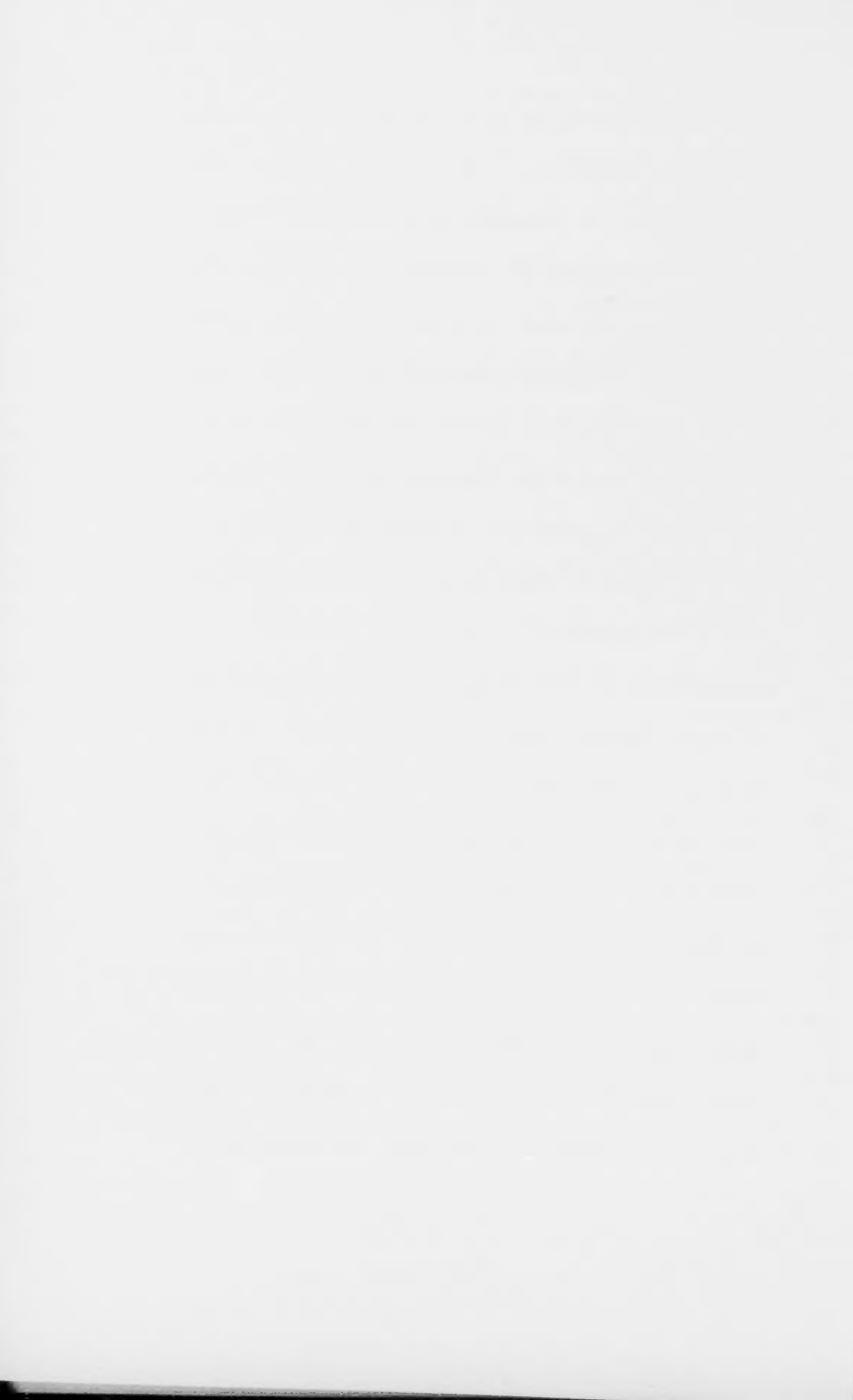
As to the Department's concerns for protecting the safety of participants in the parade and other members of the public, which of course are conceptually legitimate, the district court found that the Department had overstated the danger of a confrontation in the event plaintiffs' group were permitted to occupy the Cathedral sidewalk. I see no

basis in the record to hold this finding clearly erroneous; and even if the "independent appellant review" standard suggested in Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 104 S.Ct. 1949, 1984, 80 L.Ed. 502 (1984), were to apply, I would not consider the district court's finding erroneous. The record shows that a Gay Pride March has been held each year since 1970; plaintiffs' group, Dignity of New York, has conducted a special service in front of St. Patrick's each year since at least 1976; prior to 1983, Dignity's special service was conducted on the steps and sidewalk in front of St. Patrick's throughout the parade; in 1981, there were two isolated instances of violence, each instigated by and involving a single anti-gay individual; in the following year, plaintiff's group conducted the same type of parade-long ceremony as it had in 1981 on



the Cathedral steps and sidewalk, and there were no incidents. In recent years the Department has annually predicted that there would be massive violent confrontations between gays and anti-gays in the area around St. Patrick's during the March; but except for the two minor incidents in 1981, there has been no violence attendant upon the March or plaintiffs' special proceedings.

In light of this record, and in light of the Department's standard policy of maintaining a one-block buffer zone between mutually antagonistic demonstrations, I would not upset the district court's finding that the Department's concern for safety was not sufficiently particularized and well-grounded in fact to justify its blanket ban of plaintiffs from the Cathedral sidewalk. I conclude that the district court applied the correct legal principles, that its findings of fact were not erroneous, and that the granting of



injunctive relief in plaintiffs' favor was not an abuse of discretion.

B. The Form of the Injunction

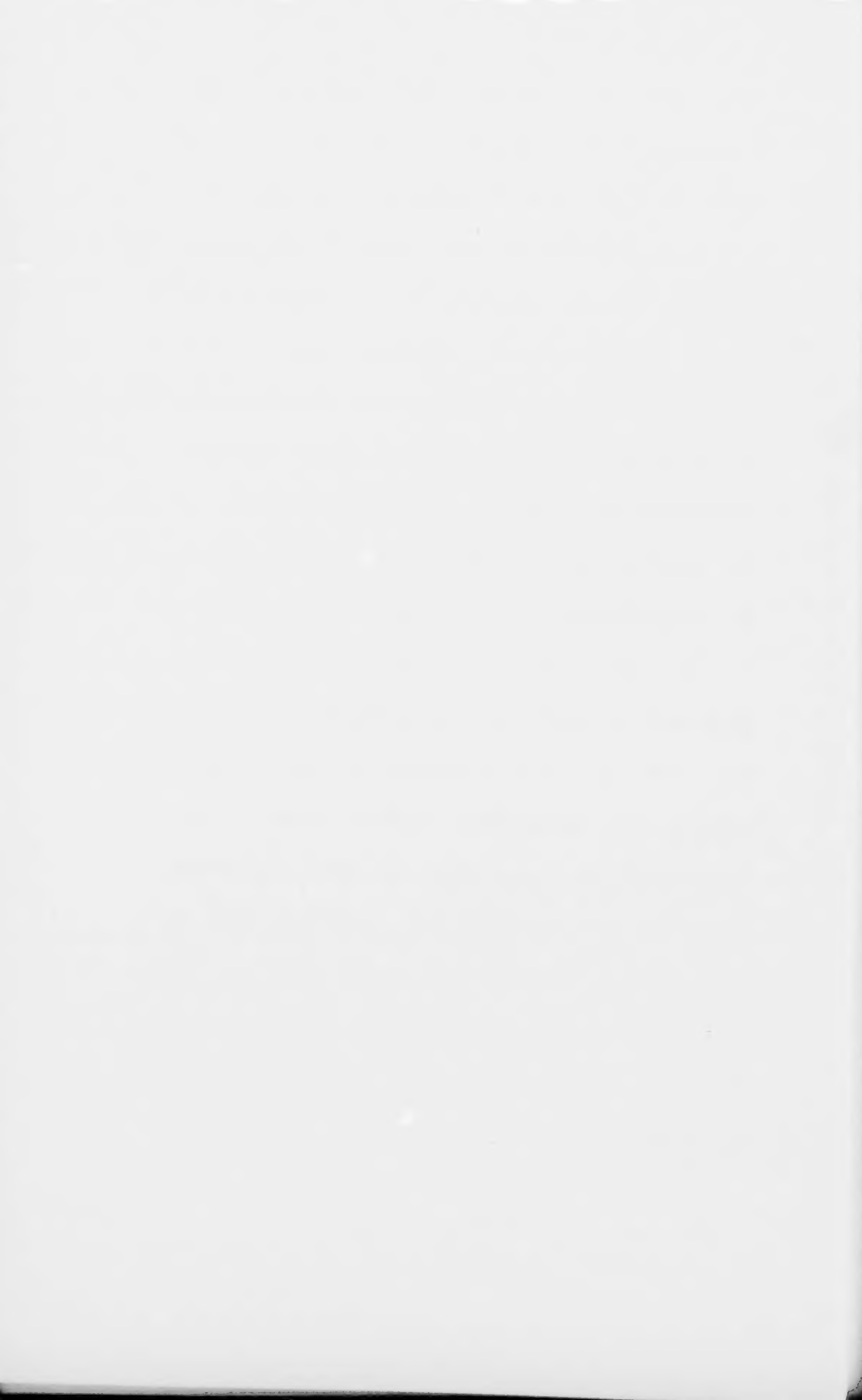
Notwithstanding my agreement with the district court that an injunction premitting plaintiffs to occupy the Cathedral sidewalk is appropriate, I believe the injunction as entered is not sufficiently "specific in terms," Fed.R.Civ. P. 65(d). While often it may suffice to order a party to proceed in a "reasonable" manner, it appears to me that the inflexible position taken by the Department forecloses such an approach here.

The Department adheres to the position that it is unreasonable to permit more than one or two members of plaintiffs' group to enter the Cathedral sidewalk. If, in the face of that adherence, the court orders only that plaintiffs be permitted to enter



that area in "reasonable" numbers, the Department may arguably proceed on the basis that its view of what is reasonable has not been rejected by the court. This would make it difficult on June 30 for plaintiffs to show on-the-scene officials an order requiring that more than one or two of them be allowed on the sidewalk, and difficult thereafter to obtain judicial enforcement of the court's order in the event those officials are unpersuaded on June 30.

At the hearing below, the court appeared to reject the Department's position that one or two constituted the largest number of plaintiffs' group that could reasonably be permitted on the Cathedral sidewalk, and appeared to indicate that it considered plaintiffs' proposed 100 to be reasonable. While it is difficult to quantify precisely what is "reasonable," it appears to me that, in the face of the Department's



adamant refusal to exercise any discretion as to what number greater than one or two may be reasonable, the court should, for the protection of both sides, specify a number.

Accordingly, I would be inclined to construe the district court's use of the term "reasonable" as meaning approximately 100, and would direct (1) that the injunction be thus clarified, or (2) that the district court clarify the injunction by inserting in it such other number as that court considers more appropriate.



ORDER OF THE UNITED STATES DISTRICT
COURT OF THE SOUTHERN DISTRICT OF
NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL J. OLIVIERI, J. MATTHEW
FOREMAN, MICHAEL DILLINGER, TOM
KOHLE, RICHARD FERRARA, EDMUND W.
TRUST, HUGH R. BRUCE, JOHN R.
EDWARDS, JOSEPH BROWN, JULIUS J.
SPOHN, BERNARD L. TANSEY, CLINT
WINANT, JAMES DOYLE, DAVID LAWLOR,
JIM CANNON, NED LYNAM, EDWARD
BRYNE, MICHAEL CONLEY, EDWARD
HARBUR, ROBERT J. BUEL, CHRISTOPHER
WESOLOWSKI, GARY W. SPOKES and
DIGNITY-NEW YORK,

Plaintiffs,

-against-

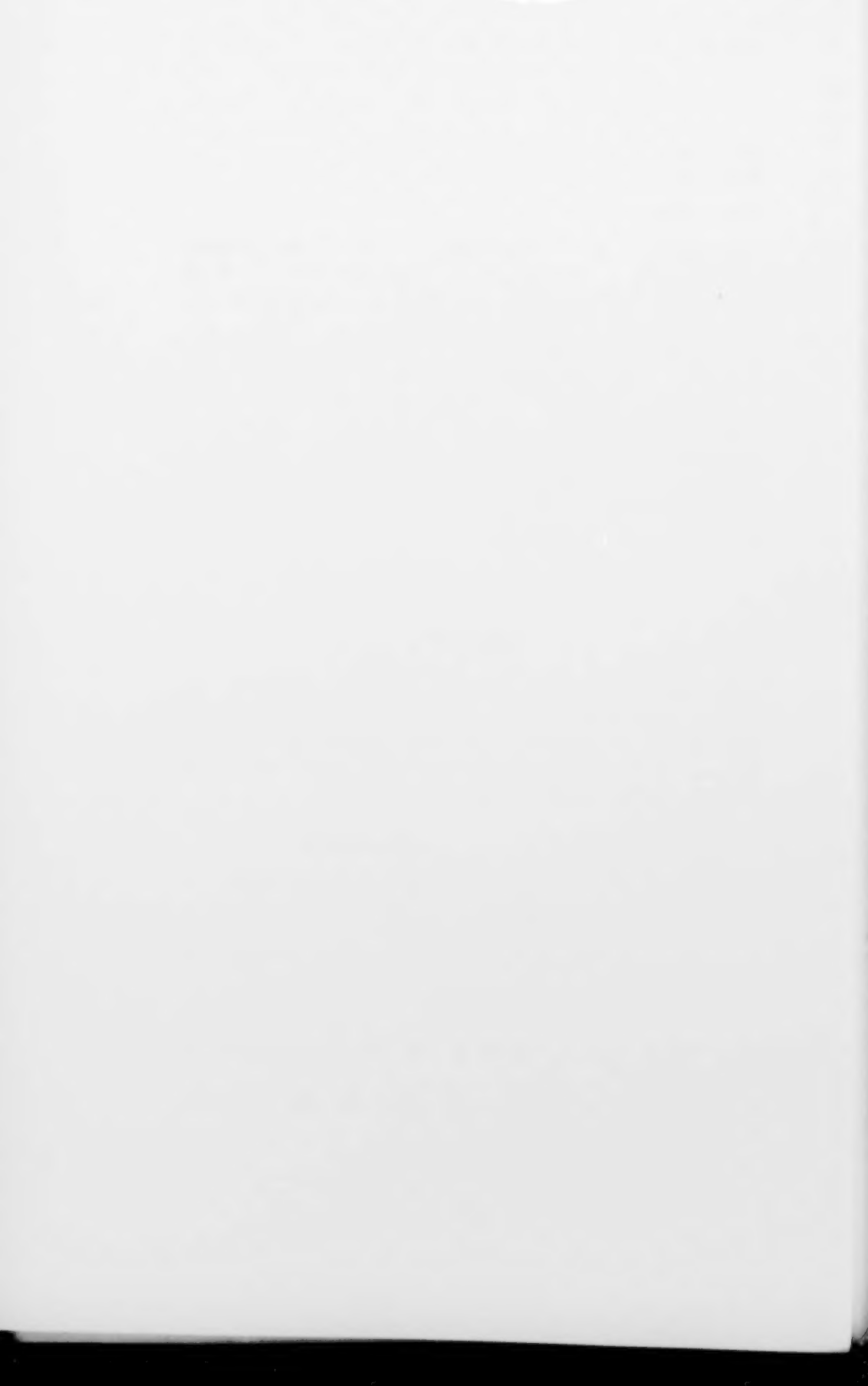
BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his capacity as the
Mayor of the City of New York, and the NEW
YORK CITY POLICE DEPARTMENT,

Defendants.

JUNE 18, 1985

ORDER

The court having issued findings of
fact and conclusions of law in the above-



captioned matter on June 13, 1985, and the court having examined the plan produced pursuant to the court's order by defendant New York City Police Department, received as Exhibit C, and the court having concluded that said plan will accommodate the First Amendment rights of plaintiffs while permitting defendants to maintain public order, it is hereby

ORDERED that, in accordance with the court's findings of fact and conclusions of law and order of June 13, defendants be and hereby are enjoined from preventing a reasonable number of plaintiffs' members from holding a peaceful demonstration on the sidewalk in front of St. Patrick's Cathedral on Fifth Avenue between Fiftieth and Fifty-First Streets in New York City during the "Gay Pride March" on Sunday, June 30, 1985. It is further

ORDERED that defendants are not prohibited from exercising their professional judgment to maintain order through the reasonable restrictions suggested in Exhibit C or through more restrictive emergency measures if public order and safety are threatened during the March itself. It is further

ORDERED that this order is stayed pending defendants' expedited appeal.

SO ORDERED

CONSTANCE BAKER MOTLEY
Chief Judge

Dated: New York, New York
June 18, 1985



DECISION OF THE UNITED STATES
DISTRICT COURT SOUTHERN DISTRICT OF
NEW YORK

MICHAEL J. OLIVIERI, J. MATTHEW
FOREMAN, MICHAEL DILLINGER, TOM
KOHLE, RICHARD FERRARA, EDMUND W.
TRUST, HUGH R. BRUCE, JOHN D.
EDWARDS, JOSEPH BROWN, JULIUS J.
SPOHN, BERNARD L. TANSEY, CLINT
WINANT, JAMES DOYLE, DAVID LAWLOR,
JIM CANNON, NED LYNAM, EDWARD
BYRNE, MICHAEL CONLEY, EDWARD
HARBUR, ROBERT J. BUEL, CHRISTOPHER
WESOLOWSKI, GARY W. SPOKES,
DIGNITY-NEW YORK,

Plaintiffs,

- v. -

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York and the
NEW YORK CITY POLICE DEPARTMENT,

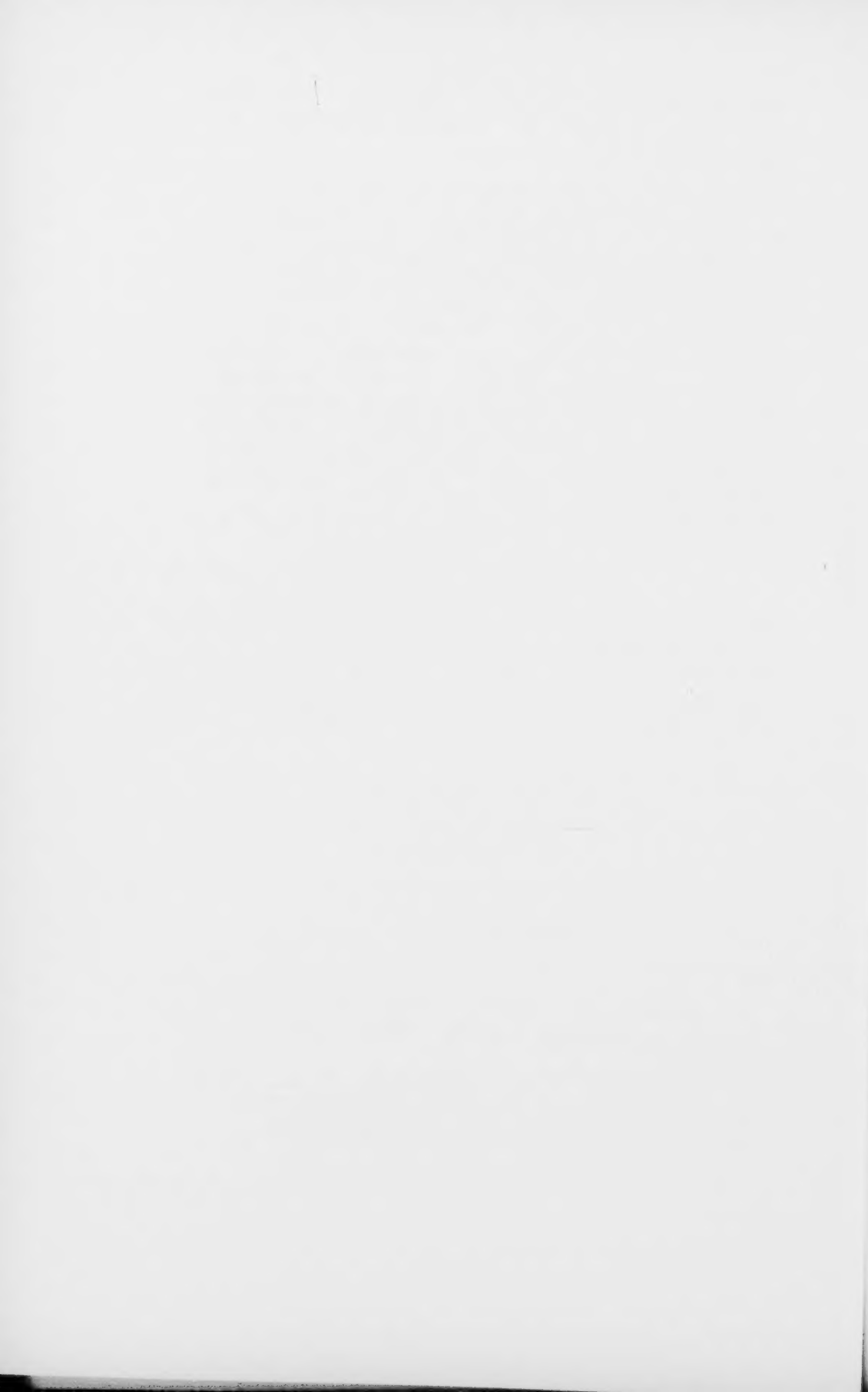
Defendants.

No. 85 Civ. 3269 (CBM).
United States District Court,
S.D. New York.

June 13, 1985.

Suaert W. Gold, Anne E. Verdon,
Valerie Caproni, New York City, for
plaintiffs.

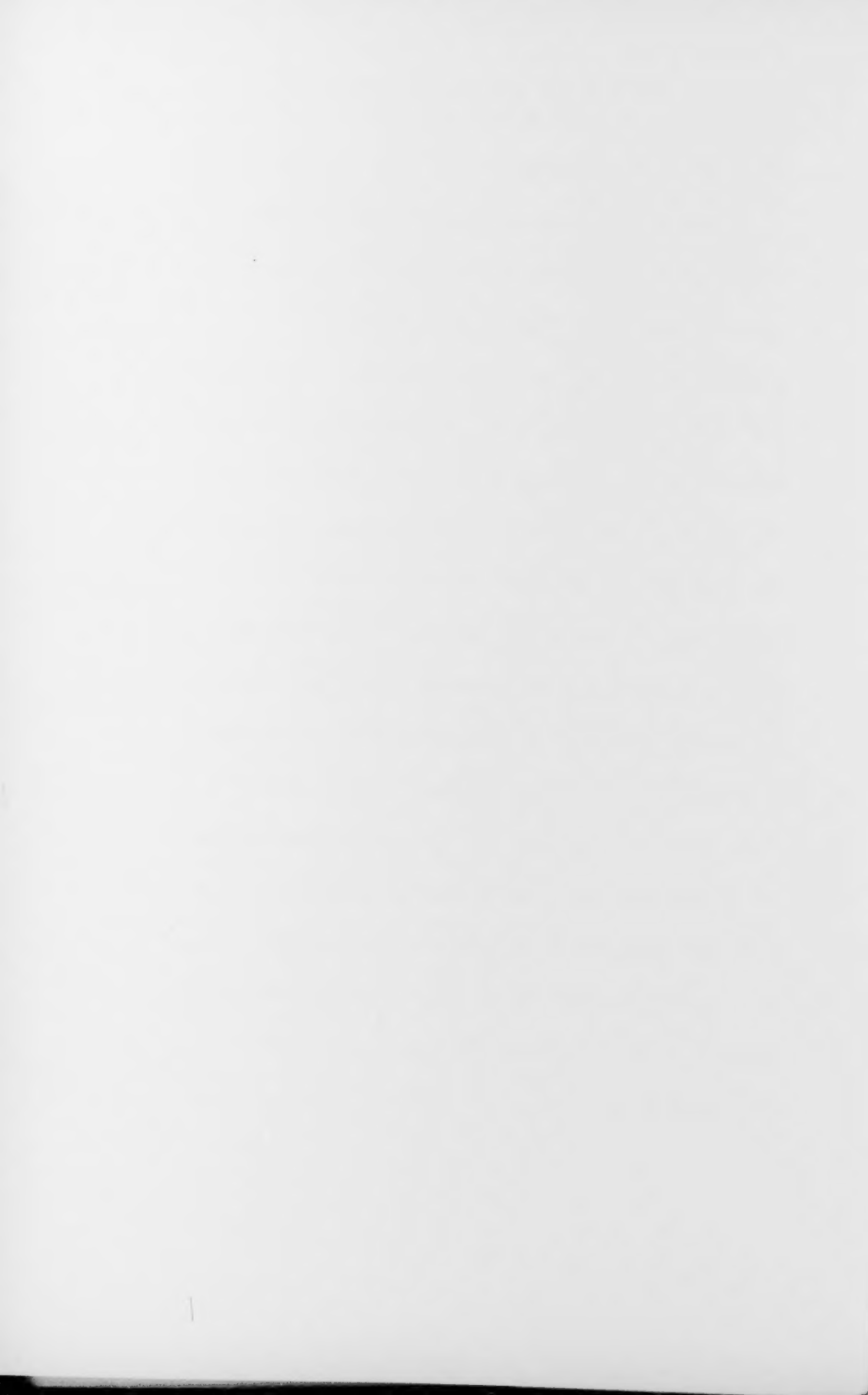
Frederick A.O. Schwarz, Jr., Corp.
Counsel by David D. Drueding, Jonathan L.
Pines, New York City, for defendants.



FINDINGS OF FACT AND
CONCLUSIONS OF LAW

MOTLEY, Chief Judge.

Plaintiffs seek to enjoin defendants, on the basis of the First Amendment, from prohibiting them from demonstrating on the public sidewalk in front of St. Patrick's Cathedral during the annual "Gay Pride March" to be held in New York City on June 30, 1985. Defendants maintain that in order to prevent a hostile confrontation between plaintiffs and certain antagonistic demonstrators, both groups must be banned from the sidewalk and relegated to controlled demonstration areas across Fifth Avenue. The matter is before the court on the motion of plaintiffs for a preliminary injunction. A hearing was held on the motion on May 24, 28, and 29 and June 12. The court now makes the following findings of fact and conclusions of law.

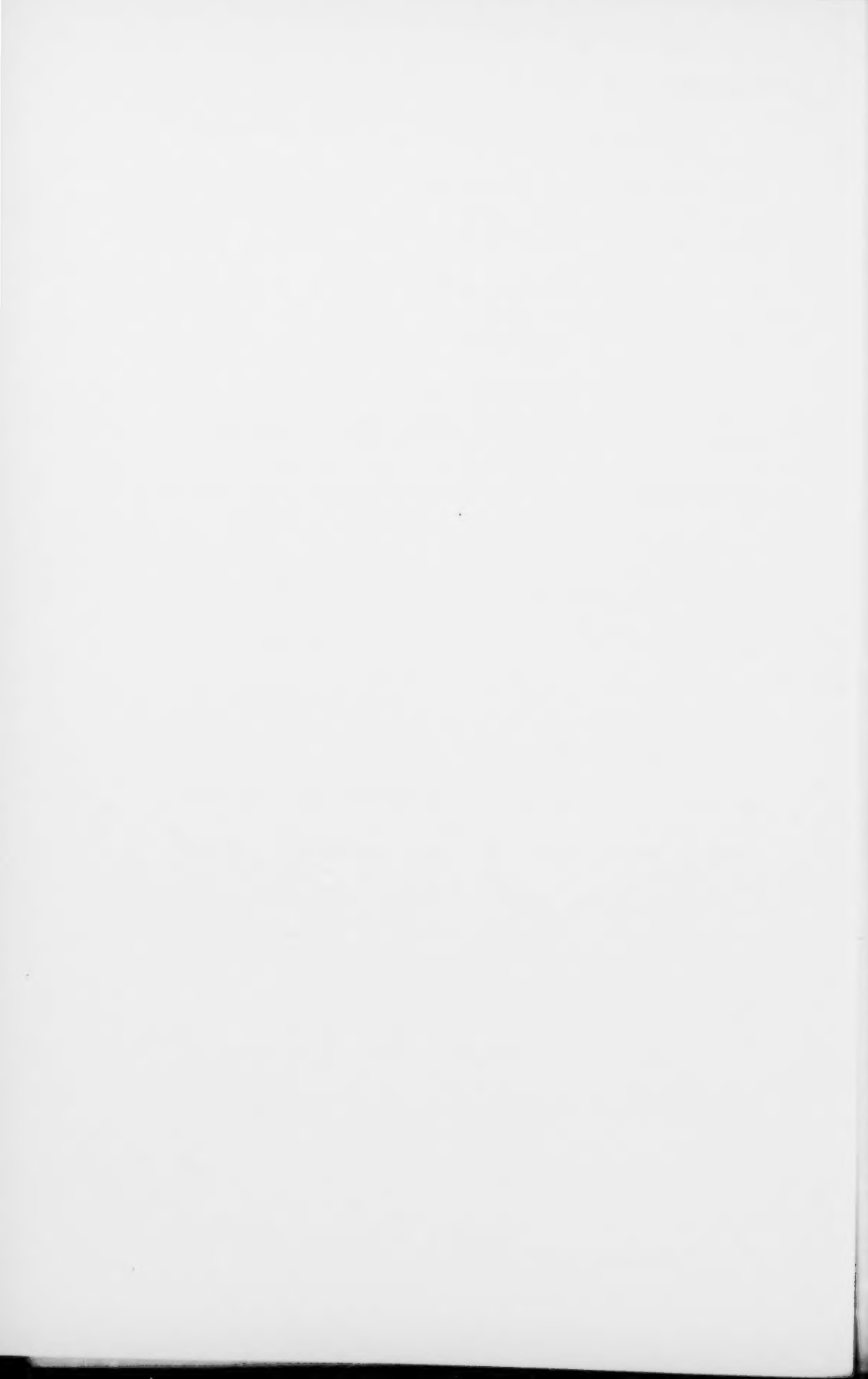


FINDINGS OF FACT:

Argument before the court has revealed that the following facts are not in dispute. They are therefore adopted as findings of the court. Plaintiffs are Dignity-New York (Dignity), an organization of homosexuals who are also Catholics, and several of its members. Defendants are the New York City Police Department, its Commissioner, and the Mayor.

Every year since 1970, there has been held in New York City a "Gay Pride March," which is the major annual demonstration of solidarity organized by the local gay and lesbian community. Approximately 75,000 people take part in the parade, which proceeds down Fifth Avenue from Central Park to Washington Square. This year's March is scheduled for June 30.

From 1976 through 1982, members of Dignity were permitted to step out of the



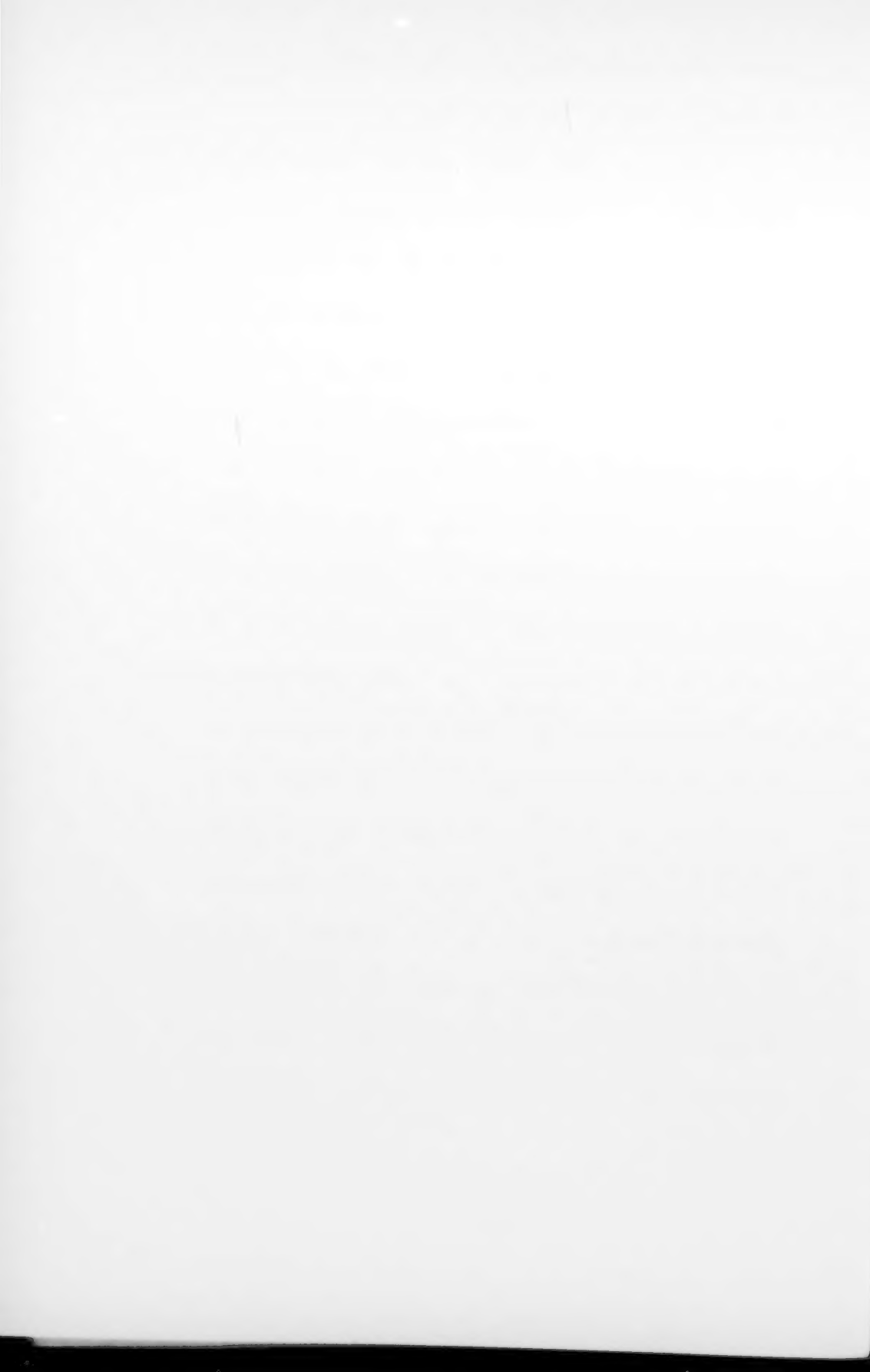
line of marchers to hold a demonstration and religious service on the steps of St. Patrick's Cathedral on the east side of Fifth Avenue between Fiftieth and Fifty-First Streets. The demonstrations were designed to convey to the passing marchers the message that homosexuals can be and frequently are practicing Catholics, and to protest the Roman Catholic Church's anti-gay position. Defendants do not dispute that Dignity, its purposes, and its activities, including its demonstrations in front of St. Patrick's, are totally peaceful and non-violent.

In 1981, two anti-gay demonstrators purporting to represent the Catholic War Veterans attacked some of the marchers and were arrested for disorderly conduct. No other violent incidents have been associated with Dignity's demonstrations. Despite this incident, Dignity was permitted to hold its



usual demonstration on the steps of St. Patrick's during the 1982 March.

Prior to the 1983 March, defendants determined to close off access to the sidewalk and steps in front of St. Patrick's, which are normally open to the public during other parades, because of threats of violence made by anti-gay demonstrators who had unsuccessfully sued to enjoin the entire March. Despite predictions that thousands of anti-gay demonstrators would appear between 50 and 100 actually attended and there was no violence. In 1984, defendants again determined to "freeze" the sidewalk in front of the Cathedral to avoid what they perceived to be the potential for conflict between Dignity and the anti-gay demonstrators. A last minute First Amendment challenge to this restriction was dismissed by Judge Duffy of this court on grounds of laches. Once again, in 1984,

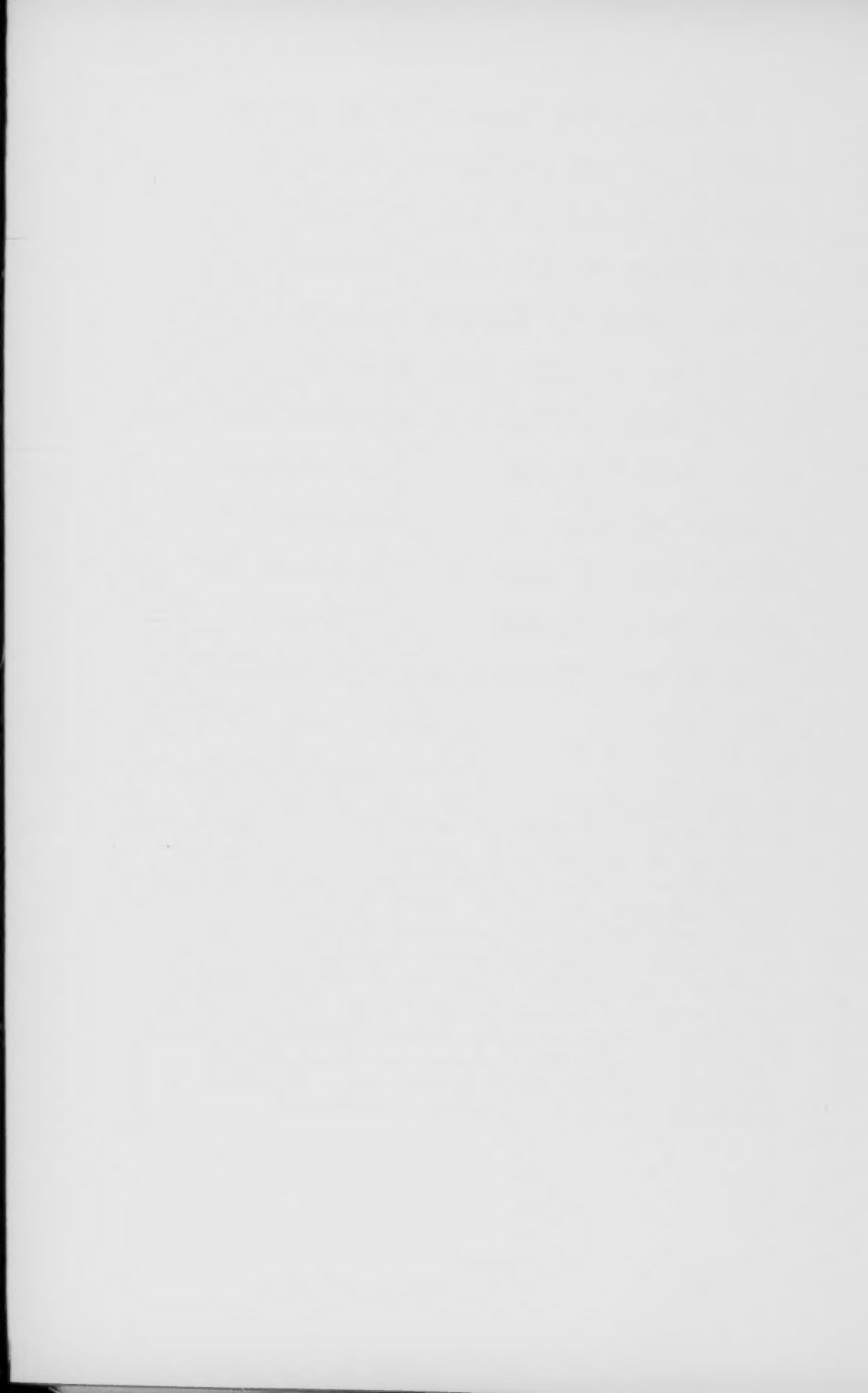


only about 100 anti-gay demonstrators appeared and no violence was reported. Two representatives of Dignity were permitted briefly onto the sidewalk in front of the Cathedral to lay a wreath.

In anticipation of this year's March, plaintiffs early on requested access to the sidewalk for a demonstration by their entire group of 200, arguing that the location in front of the Cathedral is crucial to conveying their message that gay people should be accepted as mainstream Catholics. The official organizers of the March, who hold a permit to occupy Fifth Avenue, have endorsed the proposed Dignity protest and have issued a resolution urging that Dignity be permitted access to the sidewalk as in the past.

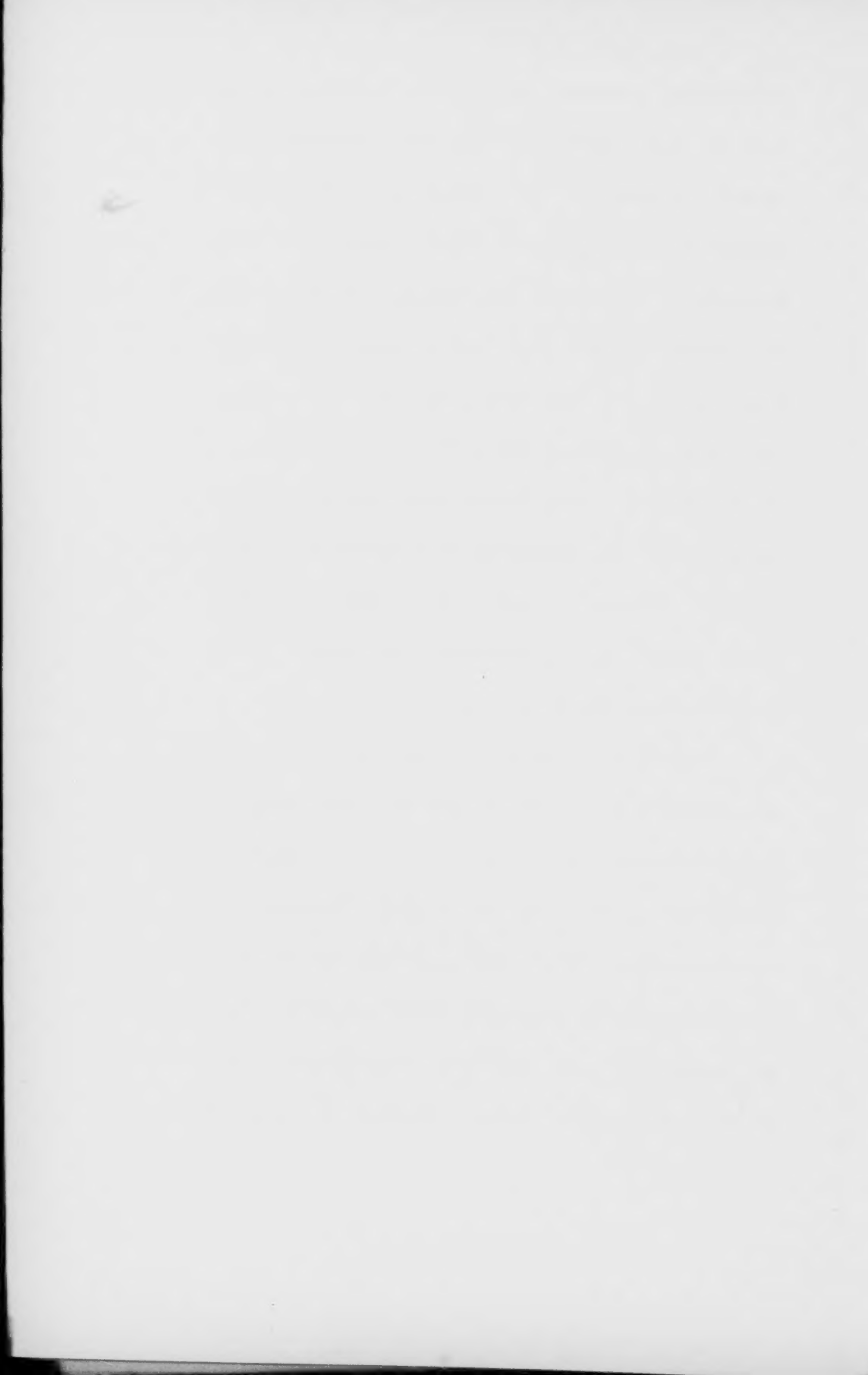
Following the demand of an ad-hoc committee of anti-gay activists¹ for equal access to the sidewalk, however, defendants again decided to deny access to all groups and to establish demonstration areas for each group, out of sight and sound of each other, across Fifth Avenue on Fiftieth and Fifty-First Streets. Defendants, in addition, propose to allow "a limited number" of Dignity members again to hold a ten to fifteen minute wreath-laying ceremony in front of the Cathedral when the Dignity

¹ The committee appears to consist of members of the Catholic War Veterans, the Knights of Columbus, and other groups. Defendants report that the anti-gay demonstrators, as they have for several years, are predicting increased attendance at their counter-demonstration this year. In addition, the police anticipate a disturbance by a group of Orthodox Jews from Brooklyn on Fifth Avenue between Forty-Seventh and Forty-Ninth Streets. There is no evidence that this action will focus on Dignity's demonstration or St. Patrick's Cathedral.



contingent passes by. The parade would halt at this point, so that the demonstration would primarily be observed by other members of Dignity. Since this plan was formulated by Police Department officials and no formal appeal had been made to Mayor Koch prior to the bringing of this action, the court required plaintiffs to appeal first to the Mayor. The Mayor has now stated his support for the Department's handling of the instant dispute. Exh. A. Since neither party called any witnesses, the court called Commissioner Ward as a witness.

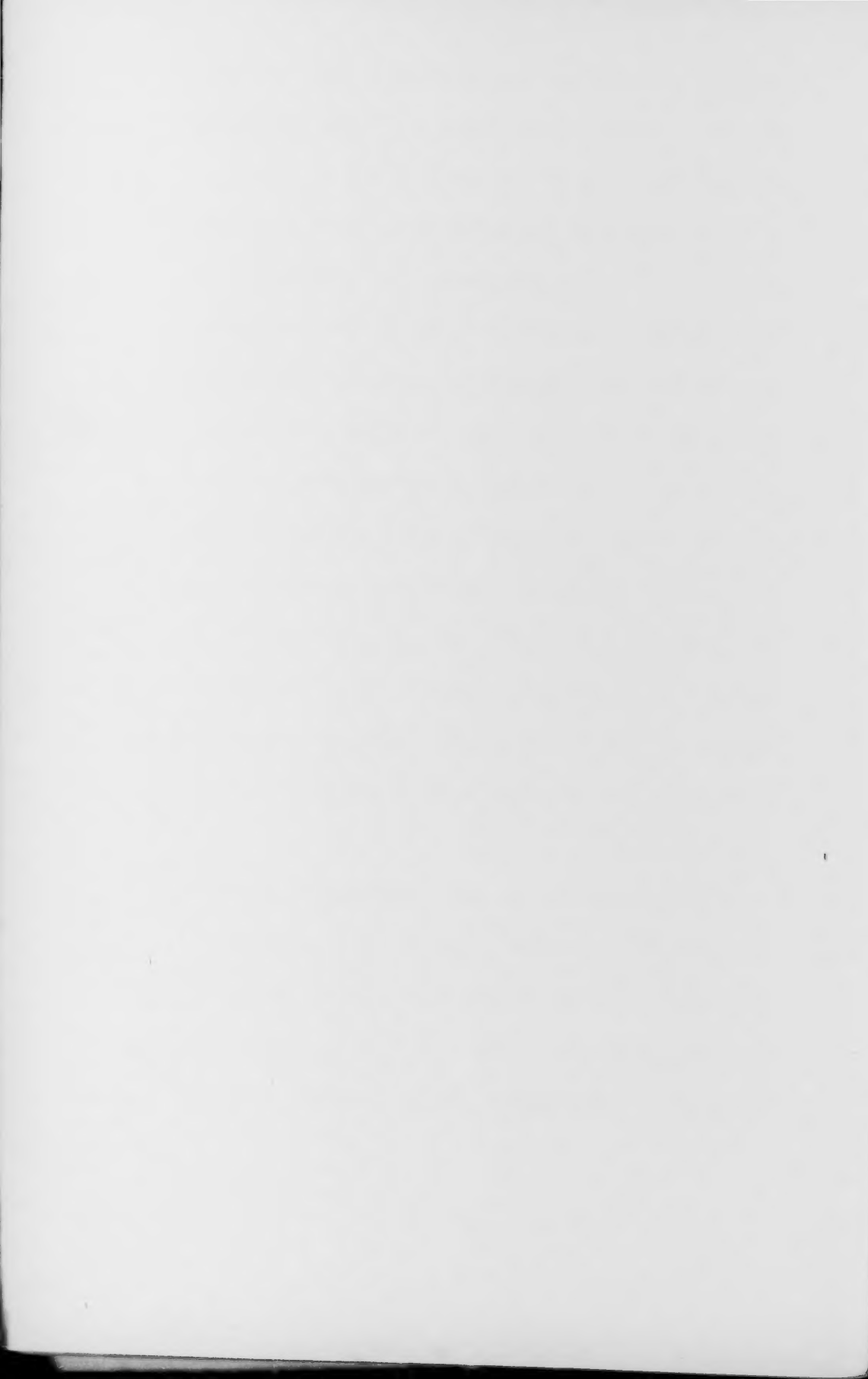
Plaintiffs have proposed several alternatives to the total ban on more lengthy demonstrations in front of the Cathedral, including permitting a limited number of demonstrators from each group to occupy each end of the sidewalk with a buffer zone in between. As another alternative, the March organizers have agreed to permit



Dignity to hold its demonstration and service in the eastern-most lane of Fifth Avenue directly in front of St. Patrick's.

Defendants, nevertheless, have rejected any plan that provides for Dignity to maintain a presence in front of St. Patrick's throughout the parade as plaintiffs demand. Defendants instead have counter-offered to move the controlled demonstration areas across Fifth Avenue onto Fiftieth and Fifty-First Streets around the corner from St. Patrick's but still out of sight of each other. Plaintiffs reject this proposal because, like defendants' original plan, it puts them out of sight and sound of many of the marchers.

In response to the court's suggestion that both groups could be permitted controlled access to the sidewalk in severely limited numbers with a buffer zone in between, defendants have raised several



objections. Defendants insist that mutually hostile gay and anti-gay demonstrators must be separated, preferably by a full city block, to avoid the danger of violence. Defendants further argue that even if the groups are sufficiently limited and separated to avoid violence between the sidewalk demonstrators, the potentially violent anti-gay demonstrators must be isolated from the main line of marchers. Defendants' counsel states that it is the City's policy not to allow hostile demonstrators to occupy the sidewalk directly adjacent to a parade possessing an official permit. Counsel further states that in past years, anti-gay demonstrators have jeered and spat upon participants in the March, and that the organizers of the 1985 March therefore have requested that counter-demonstrators be kept back from the line of marchers.



Defendants also argue that allowing Dignity alone to occupy the sidewalk would be an impermissible content-based restriction because it would deprive the anti-gay groups of their preferred symbolic backdrop. Defendants nevertheless report that the anti-gay groups have made no objection to defendant's plan to isolate the sidewalk and further concede that in keeping Dignity from demonstrating in front of the Cathedral, the anti-gay groups apparently would achieve exactly what they wanted.

CONCLUSIONS OF LAW:

In order to obtain a preliminary injunction, plaintiffs must demonstrate irreparable harm and either a likelihood of success on the merits or substantial questions going to the merits coupled with a balance of hardships tilting in their favor. Mitchell v. Cuomo, 748 f.2d 804, 806 (2d



Cir. 1984); Sierra Club v. Hennessy, 695 F.2d 643, 647 (2d Cir. 1982). The loss of First Amendment rights itself constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1160 (2d Cir. 1974). Absent preliminary injunction, any injury to plaintiffs' First Amendment rights in this case would become irreparable on June 30, the date of this year's "Gay Pride March." Therefore, the question before the court is whether plaintiffs can demonstrate a likelihood of success on the merits of their First Amendment claim, or at least serious questions on the merits and a balance of hardships tilting in their favor.

The public sidewalks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating



thoughts between citizens, and discussing public questions." Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.). When a publicly owned place has been made generally available to the public for expressive activities, as the sidewalk along Fifth Avenue undeniably has, it will be considered, without more, to be a public forum. United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983). See also Concerned Jewish Youth v. McGuire, 621 F.2d 471, 473 (2d Cir.1980).

Government's ability to limit speech in a public forum, absent a compelling state interest of a kind not argued for by defendants here, is "very limited." Grace, 461 U.S. at 177, 103 S.Ct. at 1707. "[T]he government may enforce reasonable time,

place, and manner regulations as long as the restrictions are 'content-neutral, are narrowly tailored to serve a significant government interest, and leave open amply alternative channels of communication.'" Id. (citations omitted). See also Clark v. Community for Creative Non-Violence, — U.S. —, —, 104 S. Ct. 3065, 3069, 82 L.Ed.2d 221, 227, (1984). The court, in evaluating defendants' claim that the restriction on Dignity's demonstration is a constitutional time, place, and manner regulation, will address each of these requirements in turn.

Content-Neutrality

Defendants argue that their plan to move both Dignity and the anti-gay protesters to demonstration areas away from the front of St. Patrick's Cathedral is content-neutral because it favors neither



side of the dispute but merely bans all speech on the sidewalk in the interest of public order. In fact, there is no evidence that defendants seek to silence plaintiffs' message. Nevertheless, it is undeniable that the sidewalk in front of St. Patrick's has been made available to other demonstrators and parade participants in the past, and that both plaintiffs and their opponents are being removed because their speech is controversial and though likely to cause a disturbance. The Supreme Court has held that restrictions on particular subjects of speech, in addition to limitations aimed at the viewpoint of individual speakers, may render invalid an attempted time, place and manner regulation. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject manner or its content." Police Department v. Mosley,



408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972) (ban on picketing on certain subjects near school unconstitutional) (emphasis added). Accord Consolidated Edison Company of New York, Inc. v. Public Serv. Comm'n, 447 U.S. 530, 536-38, 100 S.Ct. 2326, 2332-34, 65 L.Ed.2d 319 (1980) (ban on bill inserts advocating either side of nuclear energy debate unconstitutional).

Subject matter restrictions have been approved as reasonable time, place, or manner regulations only when the setting of the speech raises special governmental concerns. See e.g., Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (security on military base); Lehman v. Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (captive audience on city transit system). "Greer and Lehman properly are viewed as narrow exceptions to the general prohibition against



subject matter distinctions." Consolidated Edison 447 U.S. at 539, 100 S.Ct. at 2334. No such exception applies here, where the forum traditionally has been open to all speakers and presents no special security problems such as are associated with military bases.

Therefore, defendants' attempt to ban all speech from the front of St. Patrick's Cathedral only on the day when the dominant subject matter will be gay rights is suspect as a subject matter distinction. Defendants nevertheless insist that since they seek not to suppress discussion on the subject but merely to move it across the street because of its alleged threat to public order, their plan passes the content-neutrality requirement. Even assuming, arguendo, that defendants' actions are content-neutral, the regulation still cannot pass muster under



the other prongs of the time, place, and manner test.

Important Governmental Interest

Defendants correctly assert that maintaining public order is an important governmental interest. When it seeks to justify curtailments on speech, however, government must do more than invoke "public order" in a general sense; it must show that there is a significant basis in fact for its prediction of disorder. Defendants "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Mosley, 408 U.S. at 101, 92 S.Ct. at 2293 (quoting Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969)). On the undisputed facts before the court, it does not seem that defendants had



much more than a speculative fear of unrest when they decided to close off the sidewalk in front of St. Patrick's Cathedral. The seven year experience of plaintiffs' full-scale demonstrations provides defendants with an unusually detailed and consistent factual record to serve as a basis for prediction. Although there was a minor scuffle caused by anti-gay activists in 1981, plaintiffs held their usual demonstration in front of the Cathedral in 1982 without incident--belying defendants' assertion that it is only the "freezing" of the sidewalk in 1983 and 1984 which has maintained order. Other than the 1981 incident, and despite veiled threats and annual predictions of mass demonstrations by anti-gay groups, there has been no other violence and no more than 100 demonstrators have ever appeared in opposition to Dignity. There is no rational basis for assuming that this year will be any different, or that



anti-gay demonstrators will appear in front of the Cathedral in such numbers as would cause a major threat to public safety.

Moreover, that plaintiffs' speech concerns controversial issues which arose popular passions is, if anything, an argument for affording Dignity's demonstration extra protection. It is precisely when speech in the public forum is provocative, challenging, and hotly contested that the core values of the First Amendment concerning the free exchange of ideas are most directly implicated--and that the state's duty to protect the speaker's right to speak is most pointedly called into play. As Justice Douglas wrote for the Supreme Court,

a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a

condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to a standardization of ideas either by legislatures, courts, or dominant political or community groups.



Terminiello v. Chicago, 337 U.S. 1, 4-5, 69 S.Ct. 894, 895-96, 93 L.Ed. 1131 (1949). See also Bachellar v. Maryland, 397 U.S. 564, 567, 570-71, 90 S.Ct. 1312, 1314, 1315-16, 25 L.Ed.2d 570 (1970); Cox v. Louisiana, 379 U.S. 536, 551-52, 85 S.Ct. 453, 462-63, 13 L.Ed.2d 471 (1965).

The case at bar does not concern complete suppression of speech, and therefore is not controlled by the "clear and present danger" standard or its modern equivalent. See Brandenburg v. Ohio, 395 U.S. 444, 447-48, 89 S.Ct. 1827, 1829-30, 23 L.Ed.2d 430 (1969) (per curiam). Nevertheless, the underlying values of Terminiello and its progeny compel the court to examine closely any assertion by the government that peaceful speech by peaceful demonstrators on a controversial public issue in a classic public forum must be curtailed even by a time, place, and manner



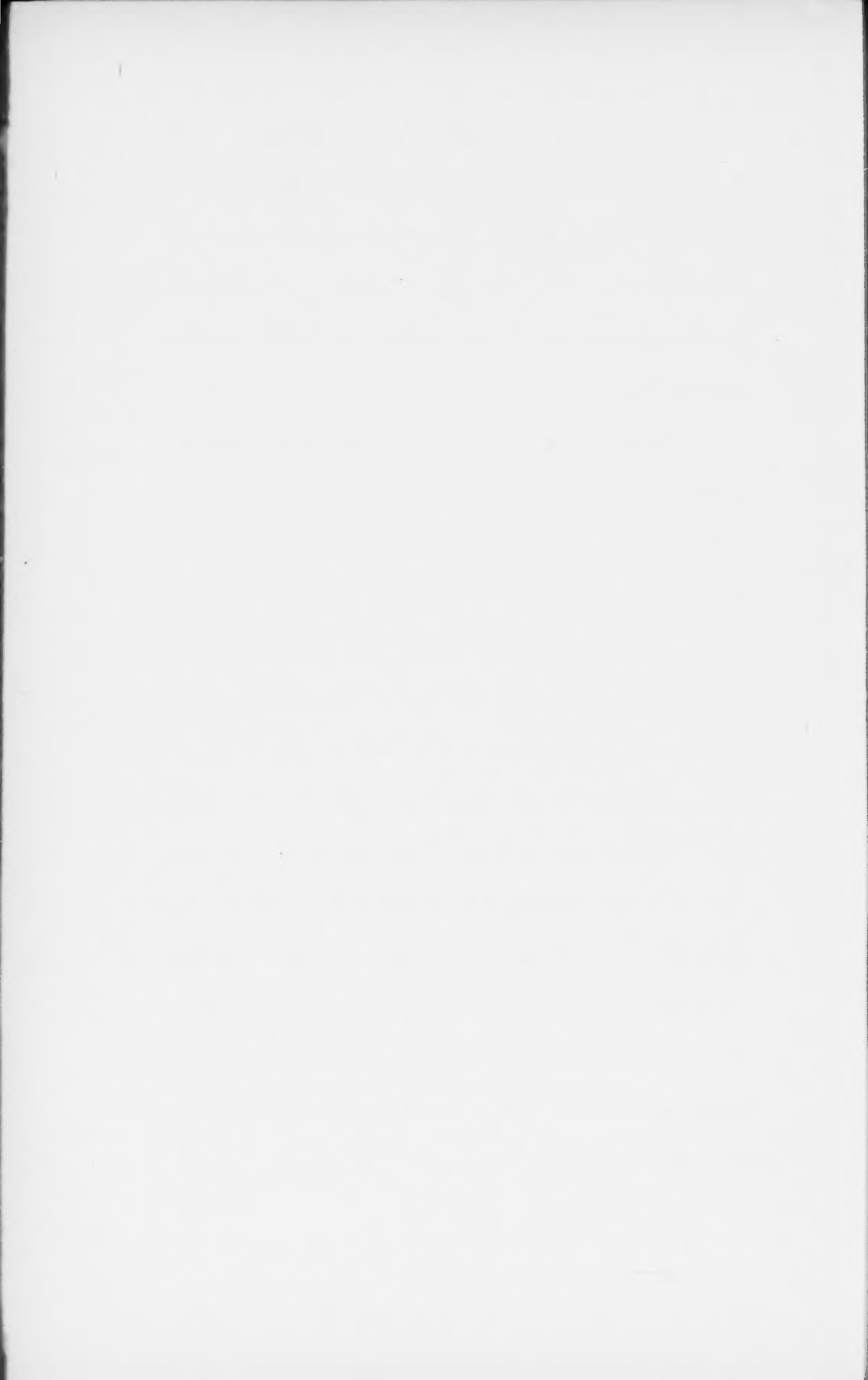
restriction because of the hostile, angry reaction of others. Our system favors what Justice Fortas described as a "hazardous freedom". Tinker, 393 U.S. at 508, 89 S.Ct. at 737, which preserves the public forum for controversial speakers and does not permit anticipation of a hostile reaction to dictate when and where speech will be allowed.

In view of plaintiffs' long history of peaceful demonstrations and the absence of a significant factual basis for a heightened expectation of violence this year, the court finds that the "important state interest" alleged in this case is comparatively weak. In reaching this conclusion, the court stresses that this is not a case where the setting of the speech implicates special government concerns. Fifth Avenue is not a military base, see Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976),

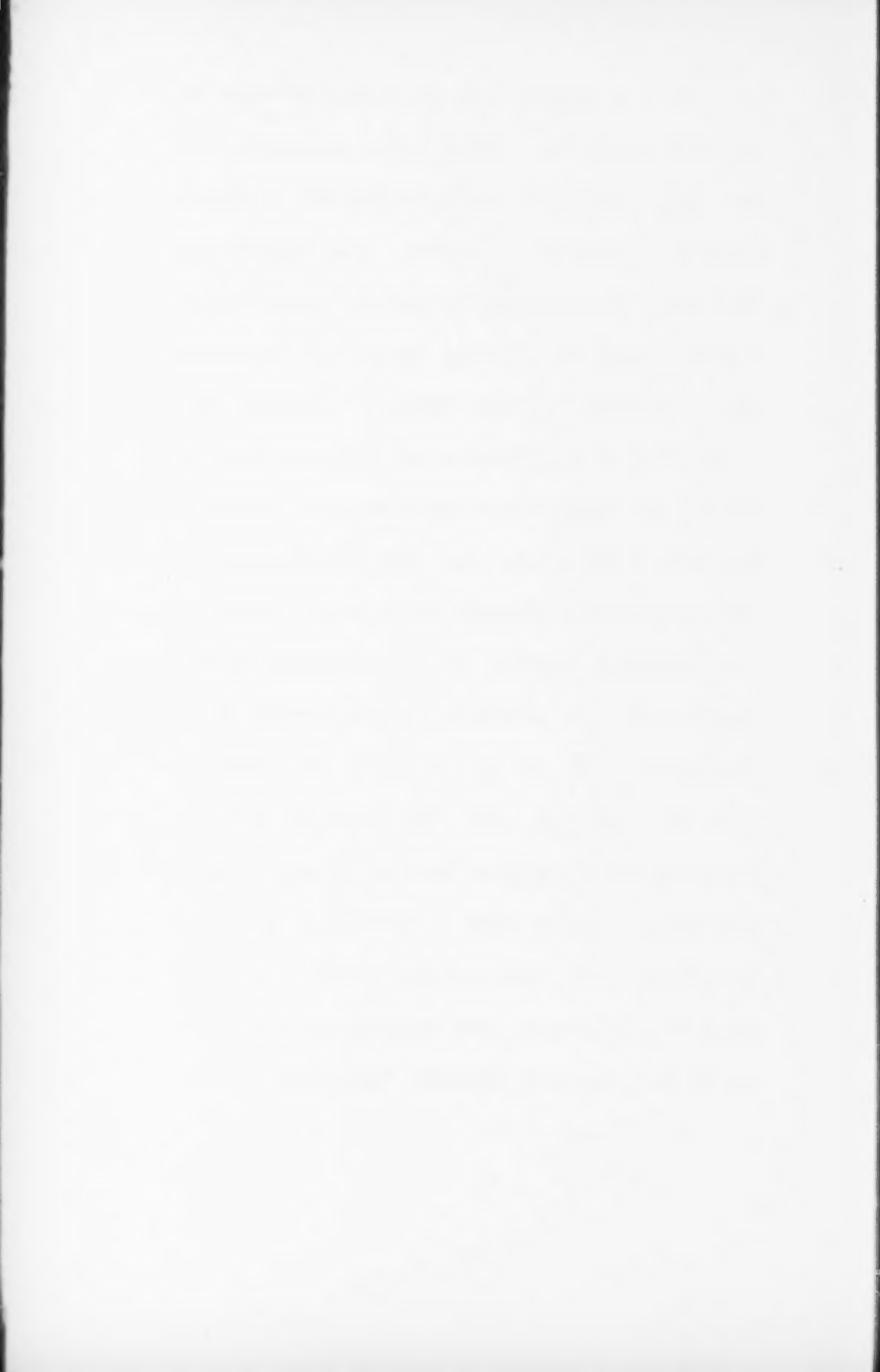


or a jailhouse, see Adderley v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L.Ed.2d 149 (1966), where extra security precautions are necessary. It is a major commercial thoroughfare and as such is the classic public forum.

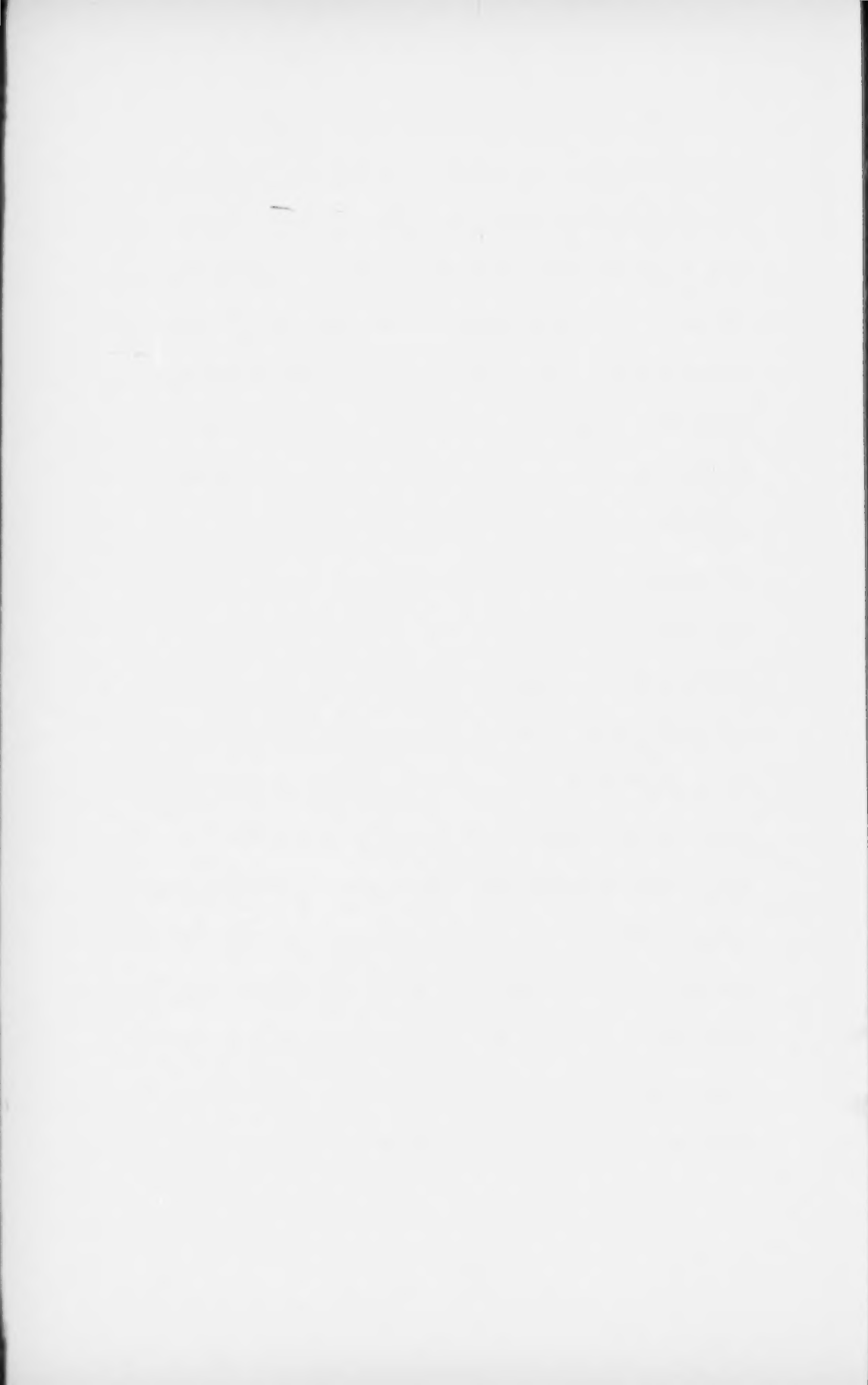
Defendants rely on Concerned Jewish Youth v. McGuire 621 F.2d 471 (2d Cir. 1980)(CJY), as support for the importance of their asserted governmental interest. In CJY, a divided Second Circuit panel upheld a ban on picketing in front of the Russian Mission in New York City and a requirement that demonstrators be confined to a "bull pen" diagonally across the street. *Id.* at 472. Judge Mansfield dissented, calling the restriction "unlawful overkill and prior restraint of appellants' exercise of their First Amendment right to picket and demonstrate in a peaceful and orderly manner." Id. at 478.



In any event, CJY is distinguishable on several grounds. First, the demonstrators in CJY included militant Jewish Defense League members. Second, the restriction was made in response to several instances of violence and an ongoing danger of terrorism and vandalism at the Mission. Third, the protection of the Russian Mission was deemed to be of heightened governmental concern because it implicated our delicate relationship with a powerful foreign adversary. Fourth, the Mission's location on a residential street implicated the privacy interests of local residents. Id. at 472-75. In the case at bar, by contrast, plaintiffs are an entirely peaceful group with a history of non-violent demonstrations, and neither potential terrorism nor international relations nor residential privacy are significant concerns on Fifth Avenue in Midtown Manhattan.



On facts analogous to CJY, in International Society for Krishna Consciousness, Inc. v. City of New York, 484 F.Supp. 966 (S.D.N.Y. 1979) (ISKCON) (Motely, J.), this court ruled that the Police Department was justified in prohibiting plaintiff religious society from practicing Sankirtan, a ritual which includes proselytizing and soliciting funds, on sidewalks immediately adjacent to the visitors' gate at United Nations headquarters. Id. at 967-68. Again, the general state interest in maintaining order was bolstered by a factually grounded concern over terrorism and the government's particular interest in maintaining traffic flow and protecting the safety and convenience of United Nations visitors, some of whom had complained about the disruptive nature of plaintiffs' activities. Moreover, the ban applied to all First Amendment activities and



did not single out one particularly controversial topic for regulation. Id. at 968-70.

In both ISKCON and CJY, the City had a significant, content-neutral reason to keep all demonstrators away from a particular site, in addition to substantial concerns about the actual activities of the respective plaintiffs. By contrast, in this case, the government's interests are based on speculation regarding disruption by third parties and there is no reason for heightened concern about terrorism or international embarrassment. In short, the state interests asserted in this case simply are not of the same magnitude as those implicated in CJY or ISKCON.

Narrowly Tailored Regulation

Even assuming, again arguendo, that defendants are able to show that sufficiently

important government interests are implicated by the facts of this case, defendants must still demonstrate that the asserted time, place, and manner regulation is narrowly tailored to serve those interests. United States v. Grace, 461 U.S. 171, 177-78, 181, 103 S.Ct. 1702, 1707-08, 1709, 75 L.Ed.2d 736 (1983). Once again, defendants' case is problematic on the facts presented. Despite plaintiffs' willingness to work with defendants on a compromise that would preserve plaintiffs' access to their preferred forum, the Police Department has rejected all suggested alternatives. While it is true, as defendants' counsel asserts, that the City is under no duty to consider every possible plan put forth by plaintiffs, the existence of a feasible and significantly less restrictive alternative would cast doubt on defendants' assertion that the "freezing" of the sidewalk



is a narrowly tailored method of maintaining public order.

One of plaintiff's suggestions--that Dignity and the anti-gay demonstrators each be permitted to occupy a portion of the sidewalk in front of the Cathedral with a buffer zone in between--was also proposed by the court as a possible compromise at the hearing on the instant motion. The suggestion was rejected by defendants because it did not adequately separate the Dignity contingent from the potentially disruptive anti-gay demonstrators and, more importantly according to defendants' counsel, because it meant that the anti-gay group would be located directly adjacent to the passing parade. Counsel explained that this would violate the city's policy of keeping potentially disruptive antagonistic demonstrators at a reasonable distance from parades that possess official permits, and



would create a danger of harassment and spitting incidents which the parade organizers had requested by prevented. Since the anti-gay demonstrators therefore must be removed from the sidewalk directly adjacent to the parade, defendants' counsel argues that content-neutrality requires that Dignity also be banned from the block.

Defendants make a facially appealing argument: Since both groups seek to avail themselves of the symbolic backdrop of St. Patrick's Cathedral, it is not for the state to decide that only one group may have that access. It is true, of course, that two objects can not occupy the same place at the same time. Thus, when two competing groups seek a street permit to parade on the same day, the City, of necessity, must choose between them, either on a first-come-first-served basis or by some other content-neutral method. The public

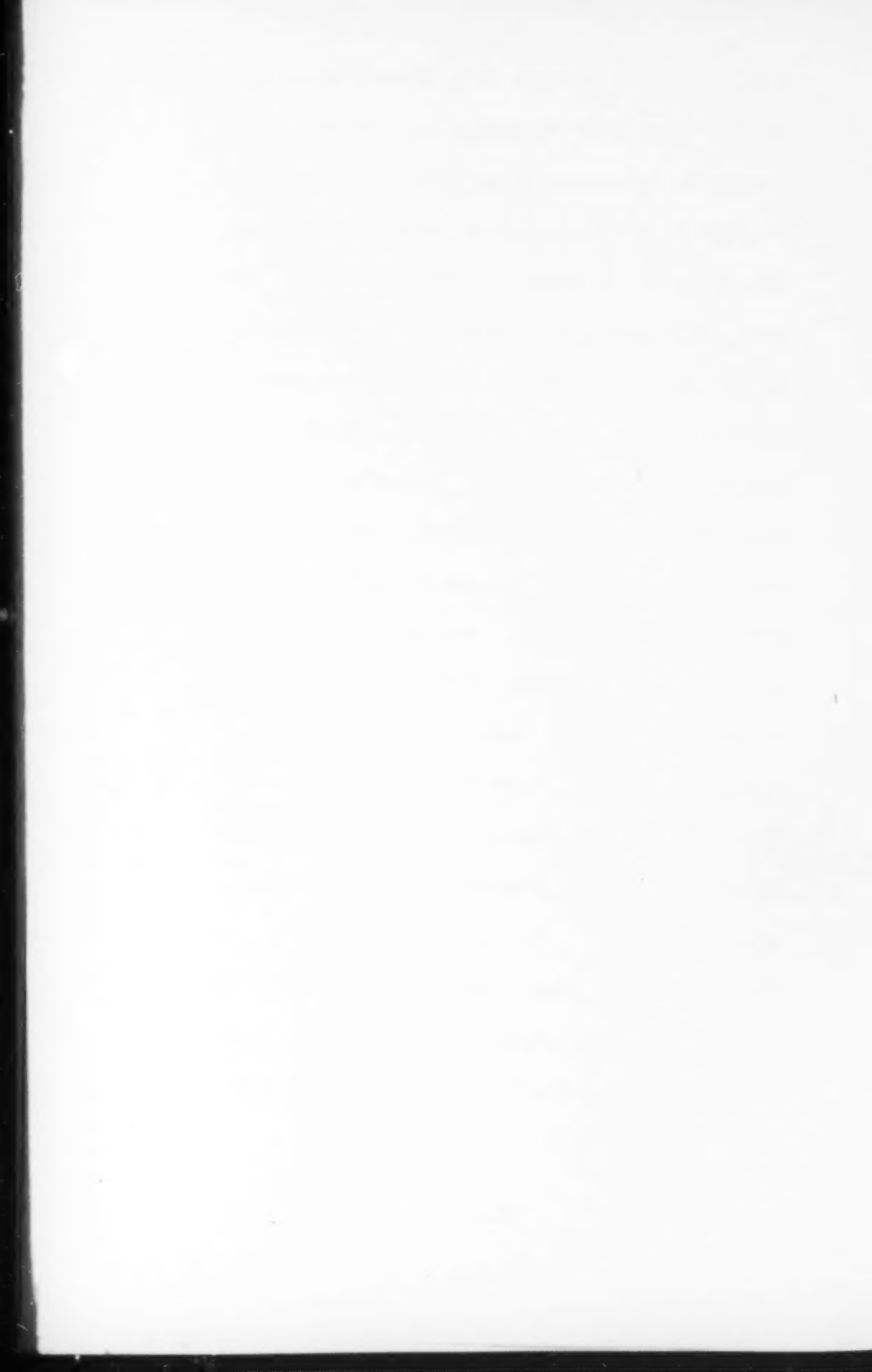


sidewalk, however, is not assigned through a permit procedure; it is a traditional public forum which the City has generally left open for anyone who wishes to use it. In the absence of some formalized procedure for assigning sidewalks to particular groups, plaintiffs' argument that they should get priority because they asked first for access to the sidewalk is without merit. To hold otherwise would be to invite the chaos of various groups scrambling to lock up particular public forums months or years in advance.

On closer reflection, however, the court is not persuaded by defendants' content-neutrality argument. The issue is not whether, given the specific facts of this case, there is justification for granting a preference to plaintiffs in the use of the forum. The question is whether there is a content-neutral reason to deny access for



either or both groups to a public forum that is otherwise open to everyone. If the court correctly understands the City's policy, even if Dignity did not propose to demonstrate on the sidewalk in front of the Cathedral, the potentially disruptive anti-gay demonstrators would not be permitted near the parade on Fifth Avenue. Once this group, which has a history of harassing and attacking pro-gay demonstrators, is removed, so is the potential for any conflict with Dignity demonstrators. The accompanying state interest in maintaining order would thereby be satisfied in full, since there is not reason to expect conflict between plaintiffs and the rest of the marchers, whose organizers support the Dignity demonstration. Assuming that it is enforced in a content-neutral way, the City's policy of keeping hostile demonstrators away from officially sanctioned parades therefore



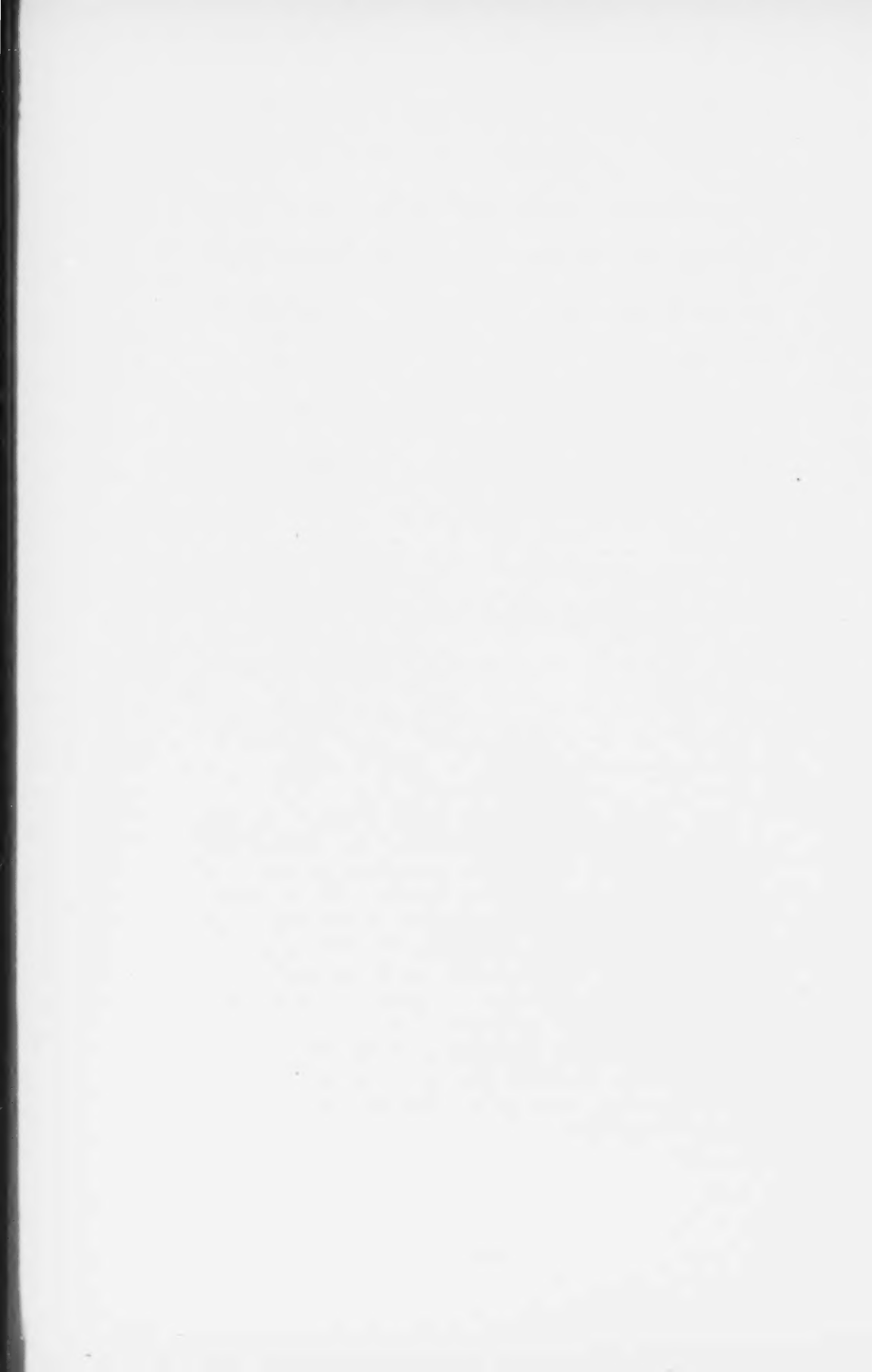
provides a substantially less restrictive way to maintain order on Fifth Avenue during the Gay Pride March: Simply keep the anti-gay demonstrators at a reasonable distance from the parade and otherwise leave the public forum undisturbed.

Once again, the facts of this case distinguish it from CJY and ISKCON, in which the activities of plaintiffs themselves created disturbances and presented a potential threat to public order and safety. Here, plaintiffs propose merely to continue their tradition of peaceful demonstrations. There has been no assertion by defendants of any overriding need to keep the sidewalk in front of St. Patrick's clear of demonstrators as a general matter, or to keep friendly demonstrators away from the site of a parade possessing a City permit. Therefore, if the City's policy of keeping hostile demonstrators away from recognized

parades removes the anti-gay group from the Cathedral sidewalk to a controlled demonstration area set back from Fifth Avenue, the further removal of Dignity from an otherwise open public forum serves no additional state purpose.²

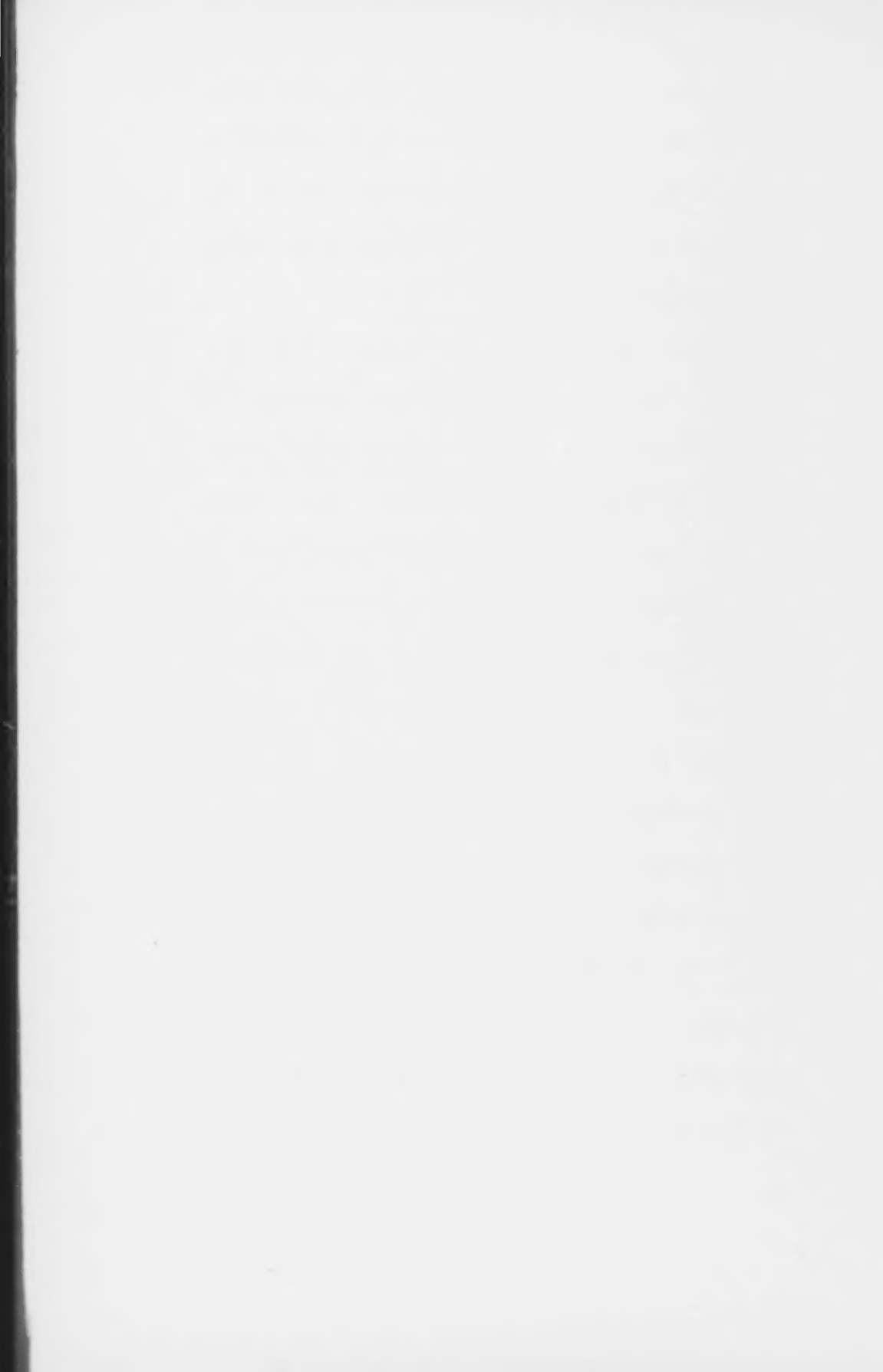
The court does not believe, despite the able and articulate advocacy of defendants' counsel, that permitting Dignity to hold its demonstration in front of the Cathedral while removing the anti-gay demonstrators would amount to an impermissible content-based

² The court does not have before it the question whether the record of disruption caused by anti-gay demonstrators is sufficient to provide a basis for a time, place, and manner restriction removing them from the sidewalk adjacent to the parade. If, however, defendants lack a sufficient basis to enforce their otherwise content-neutral policy of preventing interference with parades, they would also seem to lack a basis for predicting violence between the anti-gay demonstrators and Dignity members.



distinction. The policy of protecting from disruption parades possessing City permits is content-neutral and presumably would be enforced no matter what messages were being disseminated.

For example, let us assume that the Catholic War Veterans and other like-minded groups were to obtain an official City permit to hold a "Family Values Parade" down Fifth Avenue on a certain Sunday and that a sympathetic group of Roman Catholics sought to hold a prayer vigil on the adjacent sidewalk. If, under this scenario, a militant pro-gay group, with a history of attacking and spitting on "pro-family" marchers, were to announce its intention to hold a demonstration on the same spot at the same time, the City would no doubt be justified in keeping them behind barricades at a reasonable distance from the parade in order to prevent interference with the officially



recognized event of the day. This would be noting more than a reasonable time, place, and manner regulation. There would be not reason, on these facts, also to prevent the prayer group from availing itself of its preferred public forum.

In the final analysis, under this more narrowly tailored approach, defendants would not be "giving" the forum to one group over another. They would merely be declining to interfere with speech in a traditional public forum except where the potential for disruption of a City-recognized parade requires that hostile demonstrators be kept at a reasonable distance.

This conclusion is bolstered by plaintiffs' undisputed observation that the primary agenda of the anti-gay demonstrators is to prevent plaintiff's speech. To remove Dignity from its preferred public forum because of fear of



disruption by its opponents would be, as plaintiffs have suggested, to provide a blueprint for a modified heckler's veto: Any group seeking to keep another group from using a particularly evocative public forum need only threaten to appear with a sufficiently large, disruptive group of counterdemonstrators and the entire area will be "frozen."

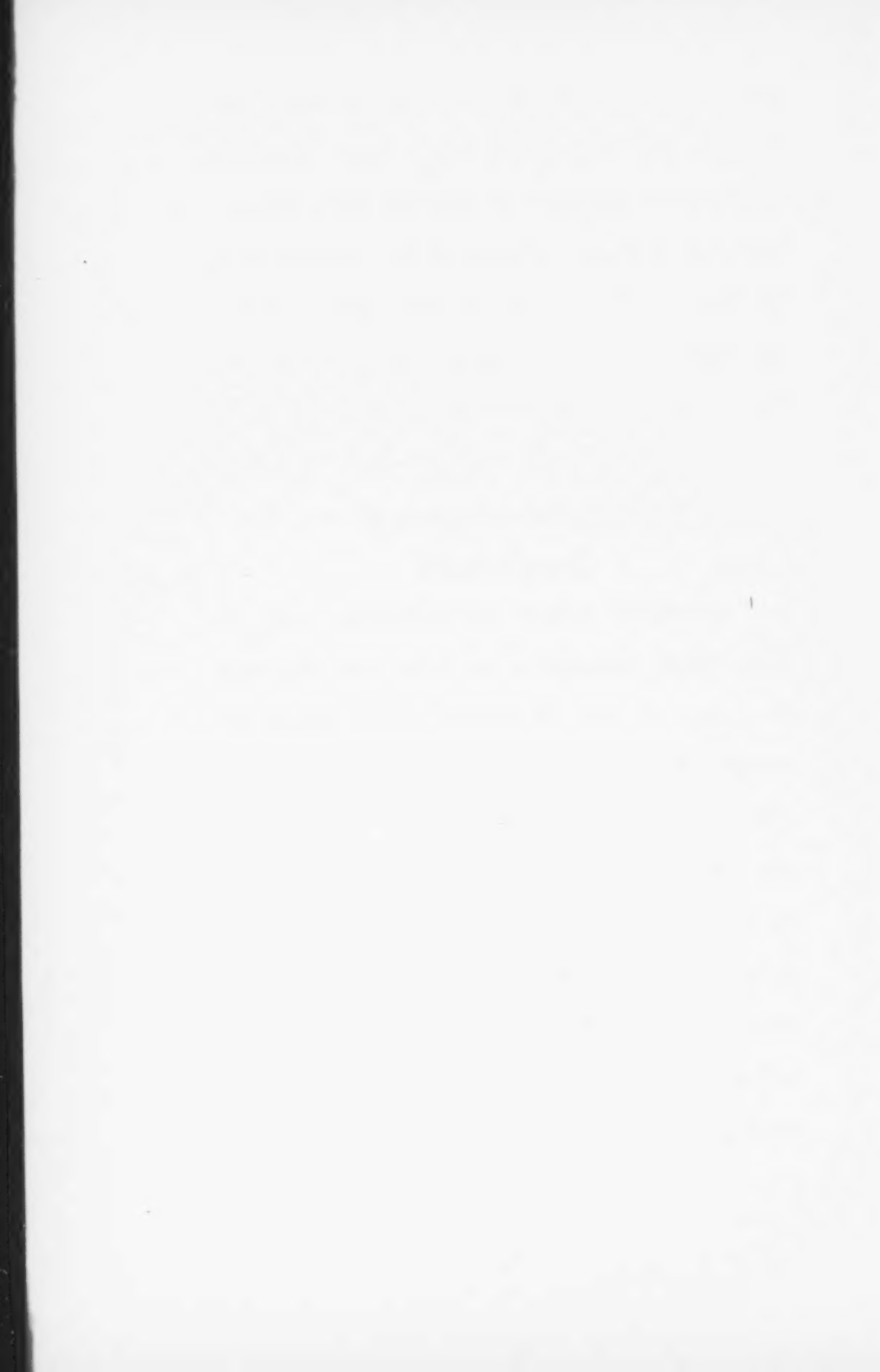
Another factual setting might present more troubling dilemmas for public officials seeking to remain content-neutral while balancing First Amendment rights against the need to maintain order. On the facts before the court, however, it is apparent that the evil to be prevented is the violent disruption of both Dignity's peaceful demonstration and the entire "Gay Pride March." Despite defendants' repeated reference to preventing violence between two "mutally hostile" groups, it is the anti-gay demonstrators and



not Dignity's members who present the threat of violence. In that context, defendants' decision to prevent both Dignity and the anti-gay groups from demonstrating in front of St. Patrick's Cathedral is not a narrowly tailored means of serving the legitimate governmental ends at stake.

Alternative Channels of Communication

Plaintiffs argue persuasively that to move their demonstration from the sidewalk in front of St. Patrick's to a sidestreet around the corner is to interfere seriously with their symbolic message, which is that gay people should be accepted as mainstream Catholics, and not shunted aside or reluctantly tolerated. The brief ten-minute demonstration directly in front of the Cathedral which defendants propose to allow, during which the parade would stop with the



Dignity contingent in front of the Church and a "limited number" of members would be permitted on the sidewalk to lay a wreath, would not permit plaintiffs to convey their message to the entire passing parade of gays and their supporters. They would, as it were, merely be preaching to the converted.

In any event, in the absence of a content-neutral regulation that is narrowly tailored to serve important governmental interests, the existence of adequate alternative channels of communication cannot justify a restriction on First Amendment rights. "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercise in some other place." Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155

(1939). Accord Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975). See also United States v. Grace, 461 U.S. 171, 180-81, 103 S.Ct. 1702, 1708-09, 75 L.Ed.2d 736 (1983).

CONCLUSION:

On the facts before it, the court concludes that plaintiffs have shown a likelihood of success on the merits of their First Amendment claim. Defendants have failed to persuade the court that their plan to "freeze" the sidewalk in front of St. Patrick's Cathedral during the "Gay Pride March" is content-neutral, that sufficiently important governmental interests are implicated by the facts of this case, that a more narrowly tailored alternative would not adequately serve whatever state interests are implicated, or that adequate alternative

channels of communication are left open by defendants' proposed regulation. Defendants' predictions of violence are largely speculative and, to the extent that these predictions are factually grounded, are based on the likelihood of violent disruption by anti-gay demonstrators. As indicated above, defendants have content-neutral policies to maintain public order without interfering with the rights of peaceful groups to use the public forum. The limitations imposed on the public forum by defendants therefore are unreasonable both in terms of the numbers of demonstrators to be allowed on the sidewalk and the duration of time that they will be permitted to occupy the forum.

Since plaintiffs have demonstrated a likelihood of success on the merits, and since the alleged harm to plaintiffs' First Amendment rights would occur on June 30,

the date of this year's March, plaintiffs also have made the requisite showing of irreparable harm. Plaintiffs therefore would be entitled to a preliminary injunction preventing defendants from denying them reasonable access to the sidewalk in front of St. Patrick's Cathedral during the March.

Defendants will not be prohibited from taking appropriate action, through the use of barricades and the deployment of officers, to maintain order and safety on Fifth Avenue during the parade. The court is confident that the Police Department, with its vast experience in crowd control at New York parades and demonstrations, can fashion a means of maintaining the public peace without denying plaintiffs access to their preferred public forum. It is not the role of the court to dictate the details of this peacekeeping effort. The court must intervene only when the police, faced with

an admittedly difficult, discretionary task, overshoot their authority to regulate First Amendment activity. Such is the case here and, absent a more reasonable plan, plaintiffs will be entitled to preliminary injunctive relief.

In view of the Commissioner's expressed willingness to compromise and work with plaintiffs on a more reasonable plan, defendants are granted an additional 96 hours to formulate a plan that will permit a reasonable number of Dignity members to hold a peaceful demonstration on the sidewalk in front of St. Patrick's Cathedral for a reasonable period of time. This plan will be presented to the court at 5:30 p.m. on Monday, June 17, 1985 in Courtroom 506.